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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 62

THE EAST NEW YORK SAVINGS BANK,
APPELLANT,

vs.

ALVIN HAHN AND HANNAH HAHN

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF KINGS

FILED APRIL 18, 1945.

SUPREME COURT OF THE UNITED STATES

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Court of Appeals
OF THE STATE OF NEW YORK.

**THE EAST NEW YORK SAVINGS
BANK,
Plaintiff-Appellant,
against**

**ALVIN HAHN and HANNAH
HAHN, his wife,
Defendants-Respondents,
and**

**PEOPLE OF THE STATE OF NEW
YORK, HAROLD MEYERS and ROSE
MEYERS,
Defendants.**

Statement Under Rule 234.

The summons and complaint in the above entitled action were served on March 27th, 1944. Issue was joined by the service of an answer by the defendants Alvin Hahn and Hannah Hahn, his wife, on April 11th, 1944. John P. McGrath and John J. Buckley appeared for the plaintiff; Collier & Collier, Esqs., appeared for the answering defendants. 3

There has been no change in parties or attorneys herein, except that the name of the defendant Christian M. Andersen has been stricken from the title and the title has been further amended by describing the defendants sued herein as "John Doe" and "Richard Roe" by their correct names; to wit, Harold Meyers and Rose Meyers.

Notice of Appeal.
SUPREME COURT,
KINGS COUNTY.

**THE EAST NEW YORK SAVINGS
BANK,**

Plaintiff,

against

1. **ALVIN HAHN**
2. **HANNAH HAHN, his wife**
3. **CHRISTIAN M. ANDERSEN**
- 5 4. **PEOPLE OF THE STATE OF NEW
YORK**
5. **"JOHN DOE"**
6. **"RICHARD ROE", last two
names fictitious, persons in-
tended being occupants of
mortgaged premises,**
Defendants.

**Index
#2918-1944.**

Sirs:

PLEASE TAKE NOTICE, that, pursuant to the provisions of Subdivision 4, of Section 588 of the Civil Practice Act, the above named plaintiff The East New York Savings Bank, relying solely upon the question involving the validity of Chapter 93 of the Laws of 1943 under the provisions of Section 10 of Article I of the Constitution of the United States and Section I of the Fourteenth Amendment of the Constitution of the United States, hereby appeals as of right, to the Court of Appeals of the State of New York, from the final judgment herein, dated the 10th day of August, 1944 and entered in the Office of the Clerk

Notice of Appeal.

of the County of Kings on the 18th day of August, 1944, adjudging that the complaint in this action be dismissed upon the ground that the plaintiff has failed to establish that Chapter 93 of the Laws of 1943 was invalid and unconstitutional at the time it became a law or at the time of the commencement of this action, and from each and every part of said judgment, and the whole thereof.

Dated, Brooklyn, New York, August 23rd, 1944.

Yours, etc.,

JOHN P. McGRATH,
JOHN J. BUCKLEY,
Attorneys for Plaintiff,
Office & P. O. Address,
2650 Atlantic Avenue,
Brooklyn, 7, New York.

To:

COLLER & COLLIER,
Attorneys for the Defendants
Alvin Hahn and Hannah Hahn,
Office & P. O. Address,
277 Broadway,
Borough of Manhattan,
New York City.

CLERK OF THE COUNTY OF KINGS.

3 4

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Summons.

SUPREME COURT,

KINGS COUNTY.

THE EAST NEW YORK SAVINGS
BANK,

Plaintiff,

against

- 11
1. ALVIN HAHN
 2. HANNAH HAHN, his wife
 3. CHRISTIAN M. ANDERSEN
 4. PEOPLE OF THE STATE OF NEW YORK
 5. "JOHN DOE"
 6. "RICHARD ROE", last two names fictitious, persons intended being occupants of mortgaged premises,
- Defendants.

To the above named defendants and each of them:

12

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons to serve a notice of appearance on the plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: Brooklyn, New York, March 23, 1944.

JOHN P. McGRATH,

JOHN J. BUCKLEY,

Attorneys for Plaintiff,

Office & P. O. Address,

2650 Atlantic Avenue,

Brooklyn 7, New York

Complaint.**SUPREME COURT,****KINGS COUNTY.****[SAME TITLE.]**

The complaint of the above named plaintiff, by its attorneys, John P. McGrath and John J. Buckley, respectfully shows to this Court and alleges:

FIRST: That on or about the 19th day of July, 1921, the defendants, Christian M. Andersen and Bertha Andersen, his wife, for the purpose of securing to The East New York Savings Bank the sum of Five Thousand (\$5,000.) Dollars, jointly and severally executed, acknowledged and delivered their certain bond, sealed with their seals, wherein and whereby they jointly and severally covenanted and agreed to pay to the said The East New York Savings Bank, as obligee, the sum of Five Thousand (\$5,000.) Dollars on April 1, 1924, together with interest thereon from the date thereof at the rate of five and one-half (5½%) per cent per annum, to be paid semi-annually on the first days of April and October in each year until said principal sum be fully paid; and in the said bond it was expressly agreed that the whole of said principal sum shall become due at the option of the obligee after default in the payment of interest for twenty (20) days, or after default in the payment of any taxes, assessments or water rates for thirty (30) days after the same becomes due and payable, or after default in the payment of any instalment of principal.

14

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SECOND: That as collateral security for the payment of said indebtedness the said Christian M. Andersen and Bertha Andersen, his wife, on the same day executed, acknowledged and delivered a mortgage which was thereafter duly recorded in the Office of the Register of the County of Kings in Liber 4971 of mortgages, at page 31 on July 21, 1921 (the mortgage tax having first been duly paid), and thereby mortgaged to the said The East New York Savings Bank the following described premises:

17

ALL that certain lot, piece or parcel of land with the buildings and improvements thereon erected, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York, bounded and described as follows:

18

BEGINNING at a point on the northerly side of Atlantic Avenue distant twenty-five (25) feet two and one-half ($2\frac{1}{2}$) inches westerly from the corner formed by the intersection of the northerly side of Atlantic Avenue with the westerly side of Sheffield Avenue; thence westerly along the northerly side of Atlantic Avenue twenty-five (25) feet more or less to a point opposite the center of a party wall standing partly on premises herein described and partly on premises next adjoining on the west; thence northerly parallel with Sheffield Avenue part of the distance through the center of a party wall one hundred fourteen (114) feet five (5) inches more or less to the southerly side of lot 23, block 22 on a map of East New York Lands belonging to John R. Pitkin, The East New York Land Company

and others, and filed in the Kings County Register's Office; thence easterly along the southerly side of lot 23 as laid down on said map twenty-five (25) feet more or less, to a point on a line drawn parallel with Sheffield Avenue from the point of beginning; thence southerly parallel with Sheffield Avenue part of the distance through a party wall one hundred seventeen (117) feet eight (8) inches more or less to the point or place of BEGINNING.

TOGETHER with all the right, title and interest of the mortgagors, of, in and to the land lying in said Atlantic Avenue in front of and adjoining the above described premises to the centre line of said avenue. 20

TOGETHER with all fixtures and articles of personal property now or hereafter attached to, or used in connection with, the premises, all of which are represented to be owned by the mortgagor and are covered by this mortgage.

THIRD: That the mortgage contained the same conditions as the said bond and further provided as follows:

"That the mortgagor will pay the indebtedness as hereinbefore provided. 21

"That the whole of said principal sum shall become due after default in the payment of any instalment of principal or of interest for twenty days, or after default in the payment of any tax, water rate or assessment for thirty days after the same becomes due and payable.

Complaint.

"That the holder of this mortgage in any action to foreclose it, shall be entitled (without notice and without regard to the adequacy of any security for the debt) to the appointment of a receiver of the rents and profits of said premises; and in the event of any default in paying said principal or interest, such rents and profits are hereby assigned to the holder of this mortgage as further security for the payment of said indebtedness."

23 FOURTH: That the defendants and each of them have failed to comply with the terms and conditions of said bond and mortgage by failing to pay the principal sum of Five Thousand (\$5,000.) Dollars which became due on the 1st day of April, 1924 and that by reason of the maturity of said bond and mortgage interest at the rate of six (6%) per cent per annum was thereafter paid.

FIFTH: That by reason of the foregoing default there is now justly due and owing to the plaintiff on said bond and mortgage the principal sum of Four Thousand Nine Hundred Twenty-five (\$4,925.) Dollars together with interest thereon at six (6%) per cent from January 1, 1944.

24 SIXTH: That no other action has been taken for the recovery of the sum secured by said bond and mortgage or any part thereof.

SEVENTH: That the defendants and each of them have, or may claim to have, some interest in or lien upon the mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequent to the lien of plaintiff's mortgage and is subject and subordinate thereto.

Complaint.

25

EIGHTH: That the plaintiff is a domestic banking corporation organized and existing under and by virtue of the Laws of the State of New York.

NINTH: That the People of the State of New York is made a party defendant herein by reason of Transfer Taxes which may be due or owing on the Estate of Bertha Andersen, a former owner of the mortgaged premises, who died June 6, 1922. That People of the State of New York is made a defendant in this action for no other reason than the possible lien of said Transfer Taxes.

TENTH: That on August 26, 1933, by Section 1 of Chapter 793 of the Laws of 1933, the Legislature of the State of New York, in the following language, declared a public emergency existed:

26

"SECTION 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination."

27

ELEVENTH: That by Section 2 of Chapter 793 of the Laws of 1933, which became law on the 26th day of August, 1933, the Civil Practice Act was amended by inserting therein a new section numbered Section 1077-a, which provided that no action or proceeding for the foreclosure of a mortgage on real property shall be maintainable solely for or on account of a default in the payment of principal secured by such mortgage or solely in the payment of any installment of principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage.

TWELFTH: That by the Laws of 1934, Chapter 278, Laws of 1935, Chapter 1, Laws of 1936, Chapter 86, Laws of 1937, Chapter 82, Laws of 1938, Chapter 500, Laws of 1939, Chapter 606, Laws of 1940, Chapter 566, Laws of 1941, Chapter 782, the application of 1077-a of the Civil Practice Act, as enacted by Chapter 793 of Laws of 1933, hereinafter referred to as Moratorium Laws, was extended from year to year until July 1, 1943, because the Legislature stated the emergency and depression which existed in 1933, as set forth in Section 1 of Chapter 793 of the Laws of 1933, had continued during that ten-year period.

THIRTEENTH: That in Chapter 93 of Laws of 1943, the application of Section 1077-a of the Civil Practice Act was further extended to the 1st day of July, 1944. Section 1 of said chapter reads in part as follows:

"SECTION 1. The serious public emergency, which existed at the time of the enactment of

Section 1077-a * * * of the Civil Practice Act as added by Chapter 793 of the Laws of 1933 * * * having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters * * * shall, notwithstanding any provision of such chapter, remain in full force and effect until July 1, 1944 * * *."

FOURTEENTH: At the time of the enactment of Chapter 793 of the Laws of 1933, the entire country was in the throes of a serious depression, affecting and threatening the welfare, comfort and safety of the people of this state. By Executive Order, banks had been closed and withdrawals by depositors in those permitted to remain open were limited, business and industry were at a standstill, scarcely any market existed for commodities, no mortgage loans on real property could be obtained, and no market existed for real property at anywhere near their value.

FIFTEENTH: At the time of the enactment of Chapter 93 of the Laws of 1943, and for some years prior thereto, the conditions set forth in Section 1 of Chapter 793 of the Laws of 1933 no longer existed and had long prior thereto ceased to exist and do not now exist; the economic and financial processes had become normal; financial and commodity markets for all commodities, including real property, were open and active; banks generally throughout the whole country had been reopened and had remained open for nine years or more and their depositors insured or otherwise protected against loss; that at the time of the enactment of Chapter 93 of the Laws

of 1943 there were and for several years had been and still are an abundance of funds for investment in real property and on real property mortgages on fair and favorable terms; that interest rates for years had been lowered in a highly competitive investment market and were and are exceptionally low and attractive to the borrower; that bank deposits had for years been increasing and were and are exceptionally high; that enormous sums were annually being loaned on real estate secured by bonds and mortgages, real property values had become stabilized and thousands of parcels were being bought, sold and mortgaged annually throughout the City of New York, the state and nation and more especially and more abundantly in the County of Kings, Borough of Brooklyn, City and State of New York.

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SIXTEENTH: That neither at the time of the passage of Chapter 93 of the Laws of 1943, nor at any time in the year 1943, nor for some time prior thereto did there exist, nor does there now exist, any depression affecting or threatening the welfare, comfort and safety of the people of the state resulting from any abnormal disruption in economic and financial processes; or any abnormal credit or currency, in the state or nation, nor in the abnormal deflation of real property values nor the curtailment of income by unemployment and/or other adverse conditions. That there was at the time of such enactment no necessity for legislative intervention by the enactment of the provisions therein nor in Section 1077 a-b-c-d-e-f or g of the Civil Practice Act, prescribed, and that Chapter 93 of the Laws of 1943 were and are null and void for such reasons and for the reasons hereinafter alleged.

Complaint.

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SEVENTEENTH: The serious depression and emergency set forth in said Section 1 of Chapter 793 of the Laws of 1933 no longer existed at the time of the enactment of Chapter 93 of the Laws of 1943, had not existed for several years and does not now exist.

EIGHTEENTH: That at the time of the enactment of Chapter 93 of the Laws of 1943, the conditions set forth by the Legislature in Section 1 of Chapter 793 of the Laws of 1933 were completely reversed. Instead of a scarcity of money and widespread unemployment, bank deposits had increased to the highest point ever recorded in the history of the nation; unemployment had disappeared and its place had been taken by a scarcity of labor; and all responsible leaders of the nation have joined in admonition to debtors to pay their debts in order to syphon off the enormous income and purchasing power of the people, and in that manner to prevent a serious inflation not only of commodity but of real estate values.

38

NINETEENTH: That by reasons hereinbefore stated, Chapter 93 of the Laws of 1943, reenacting and extending Section 1077-a of the Civil Practice Act, is null and void and violates the provisions of Section 10 of Article I of the Constitution of the United States by impairing the obligations of the contract and also violates Section 1 of the Fourteenth Amendment of the Constitution of the United States by depriving the plaintiff of its property without due process of law and by denying to the plaintiff its rights and privileges to the equal protection of the law.

39

Complaint.

WHEREFORE, plaintiff demands judgment that the defendants herein and all persons claiming under them or either of them subsequent to the commencement of this action may be forever barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises; that the said premises may be decreed to be sold according to law; that the moneys arising from the sale may be brought into Court; that the plaintiff may be paid the amount due on said bond and mortgage with interest to the time of such payment, any amounts which plaintiff may be compelled to advance in order to protect the lien of the mortgage described herein during the pendency of this action, the costs of this action and the expense of the said sale, so far as the amount of such moneys properly applicable thereto will pay the same; and that the defendant, Christian M. Andersen, may be adjudged to pay any deficiency which may remain after applying all of said moneys properly applicable; and that the plaintiff may have such other and further relief or both in the premises as shall be just and equitable.

JOHN P. McGRATH,

JOHN J. BUCKLEY,

Attorneys for Plaintiff,

Office & P. O. Address,

2650 Atlantic Avenue,

Brooklyn 7, New York.

(Verified March 23, 1944.)

**Stipulation Amending Paragraph Ninth
of Complaint.**

43

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

IT IS HEREBY STIPULATED, by and between John P. McGrath and John J. Buckley, attorneys for the Plaintiff, and Nathaniel L. Goldstein, Attorney General, attorney for the Defendant, People of the State of New York, that Paragraph Ninth of the complaint in the above entitled action be amended to read as follows:

"That the PEOPLE OF THE STATE OF NEW YORK is made a party defendant herein by reason of Transfer Taxes which may be due or owing on the Estate of Bertha Andersen, a former owner by the entirety with her husband, Christian M. Andersen, of the mortgaged premises, who died testate a resident of Brooklyn, Kings County, New York, on or about June 6, 1922. Letters Testamentary were issued on her Estate by the Surrogate's Court, Kings County, on February 1, 1928. That PEOPLE OF THE STATE OF NEW YORK is made a defendant in this action for no other reason than the possible lien of said Transfer Taxes."

44

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Dated, Brooklyn, New York, April 3, 1944.

JOHN P. McGRATH,
JOHN J. BUCKLEY,
Attorneys for Plaintiff.

NATHANIEL L. GOLDSTEIN,
Attorney General,
Attorney for Defendant, People
of the State of New York.

by: JOHN W. BARNELL,
Assistant Attorney-General.

46

Answer of Defendants Hahn.**SUPREME COURT,****KINGS COUNTY.****[SAME TITLE.]**

The defendants, Alvin Hahn and Hannah Hahn, answering the complaint herein, respectfully allege.

47 **FIRST:** They deny the allegations contained in paragraphs designated "Fourth", "Fifth", "Fifteenth", "Sixteenth", "Seventeenth", "Eighteenth", "Nineteenth" of plaintiff's complaint.

WHEREFORE the said defendants demand judgment dismissing the complaint with costs.

COLLER & COLLIER,**Attorneys for the Defendants****Alvin Hahn and Hannah Hahn,****Office & P. O. Address,****277 Broadway,****Borough of Manhattan,****New York City.****(Verified April 11, 1944.)**

48

Judgment.

At a Special Term, Part III of the Supreme Court, held in and for the County of Kings, at the Municipal Building, Borough of Brooklyn, City and State of New York, on the 10th day of August, 1944.

Present: HON. JOSEPH FENNELLY, *Justice.*

[SAME TITLE.]

This action having been commenced by the service of a summons and complaint upon the defendants, Alvin Hahn and Hannah Hahn, his wife, on March 27, 1944, and the said defendants having appeared herein and served an answer by Collier & Collier, Esqs., their attorneys, and it appearing from the affidavit of John P. McGrath verified August 3, 1944, that the defendant, Christian M. Andersen, was not served herein and is not a necessary party to this action, and that his name should be stricken from the title hereof and the defendant, People of the State of New York, having appeared herein by Nathaniel L. Goldstein, Attorney General, and having waived service of all papers except, amended complaint, notice of sale, referee's report of sale, notice of motion to confirm referee's report of sale, judgment or order thereon and surplus money proceedings, and that the true name of the defendant sued herein as "John Doe", fictitious, is Harold Meyers and that the true name of the defendant sued herein as "Richard Roe", fictitious, is Rose Meyers and that the title of this action should be amended accordingly and that the said two last

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named defendants have been duly and personally served with the summons and complaint and have not appeared herein and are now in default, and this action having come on for trial before me at a Special Term, Part III of this court and having been tried on the twenty-second and twenty-third days of May 1944, and the plaintiff having appeared on the trial by John P. McGrath and John J. Buckley, Esqs., its attorneys (John P. McGrath, Esq., of counsel), and the defendants, Alvin Hahn and Hannah Hahn, his wife, having appeared on the trial by Collier & Collier, Esq., their attorneys (Edward H. Collier, Esq., of counsel), and the court having heard the allegations and proofs of the plaintiff and the defendants having moved to dismiss the complaint at the close of the plaintiff's case on the ground that the plaintiff failed to establish a cause of action and the court having reserved decision on that motion, and the defendants having rested without offering any further proof and having renewed the motion to dismiss the complaint, and the court having reserved decision thereon, and, after due deliberation, the court being satisfied that the only question in the case is whether chapter 93 of the laws of 1943 is a valid enactment under the State and Federal constitutions, and the court having made its decision herein granting the motion made by the defendants at the close of the plaintiff's case to dismiss the complaint, it is,

ON MOTION of Collier & Collier, attorneys for the defendants, Alvin Hahn and Hannah Hahn, his wife,

Judgment.

55

ORDERED AND ADJUDGED that the name of the defendant, Christian M. Andersen, be stricken from the title of this action and that the title of this action be amended so as to describe the defendants sued herein as "John Doe" and "Richard Roe", last two names fictitious, persons intended being occupants of mortgaged premises, by their true and correct names, to wit, Harold Meyers and Rose Meyers, respectively, and it is further

ORDERED AND ADJUDGED that the complaint herein be and the same hereby is dismissed at the close of the plaintiff's case upon the ground that on the testimony, exhibits and the entire record presented by the plaintiff, the plaintiff has failed to establish that chapter 93 of the laws of 1943 was invalid and unconstitutional at the time it became a law or at the time of the commencement of this action.

56

Enter,

J. F.,
J. S. C.

Granted

Aug. 10, 1944.

FRANCIS J. SINNOTT,

Clerk.

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Judg. entered 8/18/44.

Stenographer's Minutes.

SUPREME COURT,

KINGS COUNTY.

SPECIAL TERM—PART III.

[SAME TITLE.]

Brooklyn, N. Y., May 22, 1944.

Before: HON. JOSEPH FENNELLY, *Justice*.

APPEARANCES:

59

MESSRS. JOHN P. McGRATH and JOHN J. BUCKLEY,
attorneys for the plaintiff (by JOHN P. Mc-
GRATH, Esq., of counsel).

MESSRS. COLLIER & COLLIER, attorneys for the de-
fendants Hahn (by EDWARD H. COLLIER, Esq.,
of counsel).

Mr. McGrath: If the Court please, in view of the nature of this case, I think it would be in order to make a preliminary statement as to the character of the proof we wish to offer.

60 The Court: Yes, all right, I think so.

Mr. McGrath: In the first place, your Honor will observe in the complaint that this action to foreclose the mortgage is predicated upon a principal of default only. There is no dispute but that the interest has been paid, and there are no tax arrears on the property at the present time. Therefore, we are asking for a judgment declaring a foreclosure and sale because the principal has been long past due and has not been paid.

A successful judgment for the plaintiff under those circumstances necessarily requires an adjudication that the so-called Mortgage Moratorium Law as renewed in 1943 is unconstitutional and void. The title of that law is Chapter 93 of the Laws of 1943. That is the so-called Moratorium Law which was in effect at the time that this action was commenced on March 27, 1944.

Since that date I think the Court well knows that a further renewal of the so-called Moratorium Law was had by adoption of the 1944 Legislature and the signature of the Governor, which law, as I understand it, modifies the 1943 Moratorium Law by requiring the payment of 2 percent annual amortization of mortgage principal instead of the 1 percent which was provided in the 1943 Law; and that current Moratorium Law is set to remain in effect until July 1, 1945.

It is our position that while the original Moratorium Law which was adopted in 1933, being Chapter 793 of the Laws of 1933, was valid because at that time there existed an economic emergency which warranted the Legislature in temporarily suspending the rights and obligations of contracts, nevertheless, at some point between the adoption of the 1933 Law and the renewal thereof predicated upon the same emergency in 1943—I say at some time between those dates the emergency terminated or came to an end, and, therefore, the justification for the enactment of this so-called Moratorium Legislation likewise came to an end.

As an alternative to that proposition, we urge also the proposition that if the emergency did not come to an end at some point between 1933

and 1943, then at some point between those dates it became impossible to any longer characterize the emergency as a temporary one, and it is essential for the validity of this type of legislation that the so-called emergency which is said to justify it be temporary in character, and with the passage of a reasonable length of time it is impossible to any longer designate such an emergency as temporary, and it must be said to be a continuing status rather than a temporary emergency.

65 If it be held that these economic conditions which originally gave rise to this Moratorium Legislation are still with us; then it must be held that they have taken on an aspect and nature of a continuing status rather than a temporary emergency, and the law under those circumstances would have to be declared unconstitutional.

The issue with respect to these contentions of the plaintiff is set forth in paragraph Fifteenth and following to the end of the complaint. It is asserted by us in the Fifteenth paragraph that at the time of the enactment of Chapter 93 of the Laws of 1943, and for some years prior thereto, the conditions set forth in Section 1 of Chapter 793 of the Laws of 1943 no longer exist, and had long prior thereto ceased to exist, and do not
66 now exist.

The economic and financial processes had become normal; financial and commodity markets for all commodities, including real property, were open and active; banks generally throughout the whole country had been reopened and had remained open for nine years or more, and their depositors insured or otherwise protected against loss.

At the time of the enactment of Chapter 93 of the Laws of 1943 there were, and for several years had been and still are, an abundance of funds for investment in real property and on real property mortgages on fair and favorable terms. Interest rates for years had been lowered in a highly competitive investment market, and were and are exceptionally low and attractive to the borrower. Bank deposits had for years been increasing and were and are exceptionally high. Enormous sums were actually being loaned on real estate secured by bonds and mortgages. Real property values had become stabilized, and thousands of parcels were being bought and sold and mortgaged annually throughout the City of New York, the State, and the nation, and more, particularly and more abundantly in the County of Kings, State of New York.

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We assert further in paragraph Eighteenth that the conditions which gave rise to the 1933 moratorium had by 1943 completely reversed themselves.

Instead of scarcity of money and widespread unemployment, bank deposits had increased to the highest point ever recorded in the history of the nation; unemployment had disappeared and its place taken by a scarcity of labor. All responsible leaders of the nation have joined in admonitions to debtors to pay their debts—

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Mr. Coller: May I interrupt, your Honor? I see no purpose in reading the complaint. I think that is not proof. I think we are spending a lot of time going through that.

Mr. McGrath: I am finishing this sentence, and that is all I have.

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Mr. Coller: All right.

Mr. McGrath: —in order to siphon off the enormous income and purchasing power of the people, and in that manner to prevent a serious inflation not only of commodities but of real estate values.

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Now, much of the proof to support those assertions lies in the official acts and documents of which we expect to ask the Court to take judicial notice. Such judicial notice is authorized by Section 344-A of the Civil Practice Act. And we are going to ask the Court to proceed in that manner in accepting our proof in order that the record need not be needlessly encumbered with many lengthy documents.

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Section 344-a authorizes the Court to take judicial notice of a law, statute, proclamation, ordinance or common law of a sister State of the United States, a private act or resolve of the Legislature of this State or of the Congress of the United States, an ordinance or resolution of any local governing body, a rule or regulation of an executive department, public board, agency or officer of this State, or of a city, county, town or village thereof—and here an important one—a rule or regulation of an executive department of the Government of the United States or a public board, agency or officer created by law thereof.

Under this section the Court has the right not only to take judicial notice of those matters when they are called to the Court's attention by counsel, but the Court has the further right to take judicial notice of any of such matters which the Court can discover by its own independent research or which comes to the Court's attention from whatever source.

And where a matter of law specified in that section is judicially noticed, the Court may consider any testimony, document, information or argument on the subject, whether the same is offered by counsel, a third party, or discovered through its own research. And that right extends not only to the Trial Court but also to any Appellate Court passing on the same case.

That is an extremely broad power and we submit one of great convenience in this particular case, because it enables us to offer proof in this case without making a tremendous record.

What we would like to do is this: We would like to make reference to such official documents as we wish the Court to judicially notice, and in our proof we will refer the Court to the official citations, where these documents can be found, printed in full, or where an official citation is lacking, to refer the Court to some reference source which can be readily obtained where the matter upon which we rely is set forth. And having done that, when the time comes to request the Court to make findings in this case, we will simply ask the Court to make a finding with respect to that particular data or document or legislation or decree, and embody in the finding the reference to which we have given the Court on our memorandum. That does not mean we do not intend to introduce any proof here at all. We do intend to introduce some oral proof. But in the nature of proof the amount of material available on this subject is so vast and the field so tremendous that we couldn't possibly hope to cover it all by testimony and proof.

We are going to ask the Court to take judicial notice of the state of the Moratorium Laws in this

country outside of the State of New York. And in that connection we would like to summarize the condition of moratorium legislation in this country from the report of the Joint Legislative Committee on Mortgage Moratorium and Deficiency Judgments, which was submitted to the New York State Legislature on February 24, 1942, and which is commonly known as the Janes Committee Report, and that is Legislative Document No. 45 of the year 1942.

In that document it states that there were twenty-three States in the Union which never enacted moratorium legislation. Of the remaining twenty-five States which enacted such legislation, New York State is the only State in which such legislation is still in force and effect. Such legislation has been declared unconstitutional by judicial decision in six States, these States being Arizona, Kansas, Nebraska, Texas, Mississippi and Iowa. In all the other States except the State of New York such legislation has either been repealed or it expired according to its terms and was not thereafter re-enacted.

The Court: These six States you mention that it was declared unconstitutional in, was the original moratorium legislation declared unconstitutional?

Mr. McGrath: No, sir.

The Court: Or simply the continuance of it?

Mr. McGrath: The renewal or re-enactment of it in each instance. In each instance the original legislation was sustained. The outstanding case on this subject is Home Building & Loan Association against Blaisdell, in which the Supreme Court of the United States determined that an original Moratorium Act of the State of Min-

nesota was constitutional as a temporary emergency measure; and each of the six decisions in the States I mentioned declaring the moratorium legislation in those States unconstitutional based their judgment on the authority of the Blaisdell case; and the determination of unconstitutionality was based upon a finding, a judicial finding, to the effect that the emergency which justified the original legislation no longer existed.

The Court: The Blaisdell case, as I recall it, held that an emergency must in fact exist under the law and the Constitution.

Mr. McGrath: That is right. And they also held that while the judgment of the Legislature was entitled—

The Court: Although it was entitled to consideration, it wasn't binding.

Mr. McGrath: That is right.

The Court: The Court could inquire behind it to see whether a proper emergency existed.

Mr. McGrath: It is always a proper matter for judicial inquiry, and that applied not only to the time when the Legislature enacted but also during the period when the legislation is in force. Even though it was valid when enacted, the Court can inquire at a subsequent date while it is literally in force to see whether it is still justified at that date, and if the Court finds it is not, it can say it is all over.

This legislative report to which I have just made reference is the last official document of the New York State Legislature bearing on the moratorium apart from the legislation itself which we have under attack. What I mean by that is this: In 1943 the New York State Legislature enacted a renewal of this Moratorium Legisla-

tion, and it simply stated—and I quote—it simply stated in substance that the serious public emergency which existed at the time of the enactment of the original Chapter 793 of the Laws of 1933 having continued in the judgment of the Legislature to the present time and still existing. With that preliminary recital they then re-enacted the legislation.

There was in 1943 no Legislative Committee appointed to investigate the question whether that recital was in fact true or not.

83 The Janes Committee report to which I have referred is the last report of any legislative committee on that subject prior to or since the enactment of the 1943 Legislation; and I should like for the Court to take judicial notice of this entire document, but I would like to have a statement from that document with respect to real estate conditions at the time the report was made read in the record. I should also like to read into the record the findings and recommendations of that committee.

84 First of all, the committee says at page 27 of the report "Consideration should be given to the probable real estate trends of the next few years. Real Estate Analysts, Inc., have prepared a chart showing the cycles of real estate booms and depressions from 1800 to 1940. This chart indicates that booms and depressions in real estate follow one another with considerable regularity. Experience has indicated that there is a cycle of approximately eighteen years between the crest of one boom period and another with an intervening period of depression. According to this chart, real estate entered a depression period at the beginning of 1930 and should have emerged

from such depression about 1938 or 1939. It was not, however, until 1940 that real estate passed above the normal level. By December 1, 1941, it was nearly 20 percent above normal.

"There is another factor which may play a very important part in real estate activity of the next few years. The entry of this country into war has already curtailed and may eventually stop residential building. The rent control bills now before Congress and the voluntary fair rent committees already functioning in different parts of the State are indications of the housing shortage soon to be expected. Any shortage in residential property, if it exists for a sufficient period of time, should result in an increased market for older residential properties.

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"It may well be that the next few years will see a substantial increase in the value and marketability of these older properties. It is this class of property which to a large extent is covered by the mortgages which are now within the protection of the Moratorium Laws."

One last paragraph on that.

In the spring of 1941 an action was brought in Queens County to foreclose a moratorium mortgage where there was a default only in the payment of principal. The complaint in the action referred to the Moratorium Laws and then proceeded to set forth many facts indicating that the emergency had expired and that the Moratorium Laws be declared unconstitutional for this reason, and that foreclosure of the mortgage be permitted. The motion to dismiss the complaint was denied, on which motion an opinion was written by the Court holding that the complaint stated

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a good cause of action, and that if the plaintiff was able to prove the facts alleged in the complaint the Moratorium Laws would be unconstitutional because of the expiration of the emergency.

That is the case of Kaelin against Michelson, 176 Misc. 536, Special Term, Queens County, March 26, 1941.

89 In connection with that case, I would like to say to the Court that the complaint in that case is almost verbatim the complaint in this case, the difference being the different statute which was involved there. That was the 1940 or 1941 Renewal Law, and this complaint deals with the 1943 Renewal.

The Court: Did that case go to trial?

Mr. McGrath: No, sir. The plaintiff in that case died and it was never proceeded with. However, I have the opinion of Mr. Justice Hooley in that case in my papers and reference will be made to it in our memorandum.

The findings made by the Janes Committee are as follows:

90 "The Committee finds: 1. That the emergency still exists and that the sudden termination of the moratorium would of itself now create an emergency. Any improved business and economic conditions resulting from the Defense Program and the war have largely been offset by the increase in living costs and the enormous and ever-increasing tax burden. The average home owner has received no relief from the burden of real estate taxes and on the contrary such taxes have increased since the first adoption of the moratorium.

Proceedings.

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Any present sudden termination of the moratorium might result in a very large amount of forced liquidation of mortgaged indebtedness resulting in losses alike to property owners, mortgagees, depositors and others.

"2. That conditions generally in real estate have improved and the curtailment of building during the war seems likely to further increase values. That some permanent solution of the moratorium problem should now be made before we pass through the period of war-stimulated business activity into a possible period of serious post-war depression.

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"3. That interest rates on moratorium mortgages should not exceed 5 percent, and that mortgagees should reduce their interest to 5 percent or lower to bring it in line with present-day conditions.

"4. That property owners should amortize their mortgages when the interest rate is reduced to 5 percent or lower; that annual payments of principal should be from 2 to 3½ percent depending upon the interest rate charged.

"5. That property owners unable to pay such amortization should in the event of foreclosure be allowed a reasonable time to sell or refinance, provided they have an equity in the property and have kept it in a reasonably good state of repair.

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"6. That in suits on bonds to recover interest or advances owners should be allowed to set forth a fair and reasonable market value on their property.

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*Proceedings:
Max Schnapier—For Plaintiff—Direct.*

"7. That the present law relating to deficiency judgments is satisfactory.

"8. That when the moratorium mortgages have been placed on amortization basis there will no longer be danger of extensive liquidation on the termination of the moratorium and the same should then be terminated."

The Court: We will take a ten-minute recess now.

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(There was a short recess. Thereafter the trial was resumed.)

The Court: Before we start taking any testimony, Mr. Coller, do you wish to make any statement?

Mr. Coller: No. I make no statement at all.

MAX SHNAPIER, 8913 73rd Avenue, Glendale, Queens, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Mr. McGrath: Your Honor, I am handing up a memorandum.

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The Court: All right, sir.

Mr. McGrath: And here is a copy for my adversary.

I offer in evidence a bond bearing date of July 19, 1921, made by Christian M. Andersen and Bertha Andersen, his wife, to the East New York Savings Bank, in the sum of \$5,000, which sum becomes due April 1, 1924, with interest at 5½ percent.

Mr. Coller: No objection.

(Received in evidence as Plaintiff's Exhibit 1.)

Mr. McGrath: I offer in evidence a mortgage bearing the same date between the same parties, in the same amount, and recorded July 21, 1921, in the Kings County Register's office in Liber 4971 of Mortgages, page 31.

(Received in evidence as Plaintiff's Exhibit 2.)

Direct examination by Mr. McGrath.

Q. Mr. Shnapier, what is your business? A. 98
Assistant vice-president of The East New York Savings Bank.

Q. Do you have charge of the servicing of a group of mortgages owned by The East New York Savings Bank? A. I do.

Q. Does The East New York Savings Bank own the bond and mortgage which have just been offered in evidence? A. They do.

Q. When did the principal of that bond and mortgage become due? A. April 1, 1924.

Q. Have the bond and mortgage ever been extended? A. No, sir.

Q. Has anything been paid on account of the principal sum of \$5,000? A. Yes.

Q. When and how much? A. On October 3, 1942, \$12.50 was paid. January 4, 1943, \$12.50. April 3, 1943, \$12.50. July 1, 1943, \$12.50. October 1, 1943, \$12.50. January 3, 1944, \$12.50. April 1, 1944, \$12.50. 99

Q. That makes a total of \$87.50? A. Correct.

Q. Were they the amortizations aggregating 1 percent per annum which were called for by the

100 *Max Schnapier—For Plaintiff—Direct—Cross.*

Mortgage Moratorium Law which first came into existence in 1942? A. That is right.

Q. Has interest been paid on the mortgage, and if so, up to what date? A. Up to April 1, 1944.

Q. At what rate has interest been paid? A. At 6 percent.

Q. How long have you been collecting interest at the 6 percent rate? A. Since April 1, 1929. From and after April 1, 1929.

Q. This action was commenced on March 27, 1944, is that correct? A. Yes, sir.

101 Q. At that time the only default was a default for the non-payment of principal; is that correct? A. Yes, sir.

Q. Have you demanded payment of the principal of the mortgage? A. Yes, sir.

Q. And it has not been paid? A. No, sir.

Q. Since the commencement of this action, April 1, interest and the quarterly installment of \$12.50 was paid? A. Yes, sir.

Q. How much is due at the present time on the mortgage? A. \$4,912.50.

Q. Have you computed interest on this amount from April 1, 1944 to date? A. Yes. It amounts to \$41.76.

Q. That is up to May 22, 1944? A. That is right.

102 Q. What is the total due? A. \$4,954.26.

Mr. McGrath: Your witness.

Cross-examination by Mr. Collier.

Q. The installment and interest was paid prior to the commencement of the action, is that right, in January of this year? A. Prior to the commencement of the action?

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Q. Yes. A. The installment was paid.

Q. There were no arrears prior to the installment and interest on the principal? A. No, sir.

Q. On the amortization? A. No, sir.

Q. And taxes were paid? A. Yes, sir.

Q. And after the summons was served you did receive another payment? A. Correct.

Q. You knew it was after the summons was served? A. Yes, sir.

Q. In March, I mean? A. Yes, sir.

Q. And after that payment was made, and the last payment has been made in April, there are no arrears as far as amortization or interest or taxes is concerned, is that right? A. That is right.

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Q. And that is the way it stands to this present moment? A. That is right.

Mr. Coller: That is all.

IRVIN BUSSING, 31 Grace Court, Brooklyn, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. McGrath.

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Q. Dr. Bussing, what is your business or profession? A. I am the manager of the Research and Statistical Department of the Savings Bank Trust Company.

Mr. Coller: A little louder.

The Witness: Manager of the Research and Statistical Department of the Savings Bank Trust Company.

Q. What is the Savings Bank Trust Company?

A. It is a bank owned by the savings banks of New York State. All the savings banks own stock in this company.

Q. Will you tell us what educational background and experience you had before you assumed the position which you now hold? A. From 1927 to 1936 I was Professor of Economics at Columbia University. And from 1936 to the present time I held the job that I referred to a moment ago.

Q. That is what, again? A. Manager of the Department of Economics and Statistics, Research and Statistics, Economic Research and Statistics.

Q. Will you tell us where you received your education and what academic degrees you hold?

A. I was graduated from Columbia University with the degree of Bachelor of Arts, Master of Arts, and Doctor of Philosophy in Economics. I got my degree in economics, a doctor's degree in economics, in 1935 from Columbia.

Q. When did you get your Bachelor of Arts' degree? A. 1923.

Q. And your Doctor of Philosophy? A. 1935.

Q. Following your graduation from Columbia, did you immediately undertake a position as a lecturer or an instructor in economics? A. No. I was engaged from 1923 to 1927 with the Metropolitan Life Insurance Company, and I went from the Metropolitan Life in 1927 to Columbia University as an instructor in economics.

Q. And you continued in that position until 1936? A. That is right.

Q. As an instructor? A. Yes.

Q. Now, will you give us a brief statement of your duties in your present position? A. No savings bank with the exception of the Bowery Savings Bank maintains a department of economic research. And, consequently, whenever problems of an economic character arise that do not follow in the ordinary channels of business those matters for research are turned over to Savings Bank Trust Company. The Savings Bank Trust Company in turn refers the matter to me for investigation and report. Anything in the nature of general economic research comes to my department for analysis and disposition.

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Q. And you are constantly engaged in economic research on various problems for the savings banks? A. Yes, sir.

Q. What does that department of which you are the head consist of? A. We have two junior statisticians, one chartist and one comptometer operator. The junior statisticians qualify as junior economists, and the other two people are machine operators, so to speak technicians.

Q. And they are constantly engaged in this work in addition to yourself? A. That is right, under my direction.

Q. Have you caused to be made and made yourself some research and study with respect to the economic conditions in the United States and more particularly in the State of New York in the year 1933 and in the ensuing years up to the present time? A. Yes, sir.

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Q. Have you assembled certain figures, statistics and data with reference to that study and analysis? A. I have.

Q. Will you tell us, first of all, whether that study embraces a consideration of the conditions

112 *Irvin Bussing—For Plaintiff—Direct.*

in this country and in this State with respect to bank deposits? A. Yes, sir.

Q. Will you give us a statement of your findings with respect to that situation in 1933? A. In 1935 is the first date on which we have figures comparable to 1943 figures.

113 In New York State on December 31, 1935, the amount of demand and time deposits in this State, including in there bank deposits, amounted to 13.2 billion dollars. And June 30, 1943, the last date on which we have comparable figures, bank deposits amounted to 25.7 billion dollars, which is an increase of 95 percent between those two dates.

Now, those figures apply to all banks in the State, commercial banks as well as savings banks.

As far as savings banks are concerned, in 1933 the savings banks in New York State lost 7.54 percent of their deposits. That is to say, depositors drew out that amount of money. In 1943, the year just ended, the savings banks gained 8.57 percent.

Mr. Collier: May I know what year?

The Witness: In 1943.

Mr. Collier: Over 1933?

The Witness: That is the actual gain in deposits during the year 1943, 8.57 percent.

114 Q. That would be over the preceding year? A. That means at the end of the year their deposits were 8.57 percent greater than they were at the beginning of the year 1943, whereas in the other case, in 1933, the deposits at the end of the year were 7.54 percent less than they were at the beginning of the year.

In actual dollar amount—those are percentages

—I can give you the dollar amount for the two years as follows:

In 1933 the savings banks lost \$392,000,000. That is to say, depositors took out \$392,000,000 more than they put in during that year.

In 1943 depositors put in \$500,000,000 more than they took out. Just the opposite.

In other words, in 1943 we had a gain of \$500,000,000. In 1933 you had a loss of \$392,000,000.

Q. Do you have among your documents there a statement made by the Superintendent of Banks in 1933 with respect to the conditions of currency at that time? A. Yes, sir.

Q. Will you tell us what that was? A. In 1933 the Superintendent of Banks reported that there was a shortage of currency in the State of New York. The Superintendent reported at the end of the year, "Attention was at once centered upon plans for the issuance of Scrip. And on March 6, 1933, the Governor asked the Legislature for an act authorizing the creation of a state-wide corporation to serve this purpose. Such a bill was passed immediately and the plans for the issuance of Scrip against bank deposits moved swiftly forward and were not abandoned until it was definitely known that the National Government was prepared to offer a solution."

That is taken from the Annual Report of the Superintendent of Banks for the year ending December 31, 1933, and is known as Legislative Document 1934, No. 24.

Q. Can you give us the figure of the bank deposits in the State of New York on the latest date that you have? A. The latest date is June 30, 1943, for New York State, and the figure is 25.7 billion dollars.

Q. How does that figure compare with any preceding figure in the history of the State of New York? A. It is the all-time high.

Q. Do you say the banks of the State of New York are in a stronger position today than they have ever been in their history?

Mr. Coller: I object to that.

The Court: I will sustain the objection.

A. On this matter of currency in circulation—

Mr. Coller: Are you answering the question, Mr. Witness?

The Witness: I thought the—

Mr. McGrath: The objection was sustained, which means you may not answer that question.

The Witness: I didn't finish what I was going to say about the statement of the Superintendent of Banks.

Q. You are adding to your previous answer?

A. Yes.

Q. Go ahead. A. The Superintendent called attention to the fact there was not sufficient currency in circulation in 1933.

I would like to point out that the situation is quite different today.

In 1933, taking the figures for the country as a whole—we don't have it for New York State in particular—but for the country as a whole in 1933 the amount of money in circulation was \$45.49 per capita.

In 1944, February of this year, the amount of money in circulation was \$151.22 per capita, or an increase of 3.3 times over the figures for 1933.

The Court: Is that 1944, you say?

The Witness: 1944, yes, February, 1944.

Q. Will you give us those figures in dollar amounts, too, please? A. In dollar amounts, the amount of money in circulation in 1933 for the country as a whole was \$5,720,764,000; and in February, 1944, February 29th to be exact, it was \$20,823,568,000. Those figures are taken from the Treasury statement which is published once a month.

Q. Do you have some figures assembled with reference to the purchase of War Bonds? A. Yes, sir.

Q. In this country? A. Yes, sir.

Q. In recent months? A. I have for New York State, and the comparison as between the situation in New York State and the situation in the country at large.

In New York State in 1942 individuals—I am speaking now only of bonds bought by individuals, and specifically Series E Bonds—those are the savings bonds bought by individual savers in New York State in 1942. Individuals bought \$49 per capita of E Bonds, whereas in the country at large—

The Court: Or C, is that?

The Witness: It is E Bonds, sir.

The Court: E?

The Witness: Yes, sir.

A. (Continuing) —whereas in the country at large the sale of bonds was \$28 per capita. \$28 in the country at large compared with \$49 per capita in New York State.

Irvin Bussing—For Plaintiff—Direct.

In 1943 New York has bought \$81 to every \$65.10 bought by individuals in other parts of the country.

In February, 1944, New York State, \$20.10 versus \$17 for the country at large per capita.

And in March of this year we are still ahead \$5.55 per person as compared with \$4.54 for the country at large.

All through the war period New York citizens have bought more War Bonds per capita than citizens in other parts of the United States.

Q. Did you get those figures from the Bulletin of the Treasury Department? A. Those are taken from the Bulletin of the Treasury Department for March, 1944, Table 3, page 37.

And the population figures are taken from the Bureau of the Census. I can give you more detailed citation if you want it.

Q. Do you have some figures on the gains and deposits in savings banks comparing the situation as it existed with respect to the savings banks of the State in 1933 with the situation in 1943? A. I think I have given those figures.

Q. Those are the figures you have given us? A. Yes, I have.

Q. Yes. Now, have you made a study of employment conditions in New York State? A. Yes, sir.

Q. Tell us what your figures show with respect to that. A. I have a three-fold classification on this point. First is the number of wage earners in New York State in 1933 versus 1943.

There is an increase of 92½ percent in the number of wage earners employed in New York State between the two dates, 1933 and 1943. That is the number of wage earners.

The second item is the amount of money paid to workers in New York State. That is weekly pay rolls. The aggregate of weekly pay rolls of manufacturing enterprises in New York State. There there is an increase of 266 percent between 1933 and 1943; 266 percent increase in weekly pay rolls.

The third item is in terms of weekly earnings of workers in the State. That means the amount of money that the individual receives in his pay envelope taken as an average of all the workers employed.

In 1933 the average weekly earnings of workers was \$21.90.

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In 1943 the average was \$44.68, or an increase of 103.7 percent during the ten-year period.

Those figures are taken from the New York State Department of Labor.

I might add that these figures refer to the individual earnings, and that family incomes are larger even than these figures would indicate, because in 1943 more members of the average family were at work.

In 1933 a man was fortunate if he had a job himself, to say nothing of his wife and daughter and son; but in 1943 not only was the head of the family working, but other members of his family who weren't in the Armed Services probably were working also, and consequently the actual increase and economic well-being was greater than these figures would indicate.

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Q. Do you have some figures on department store sales in 1933 as compared with 1943? A. Yes, sir. We have those figures for the Second Federal Reserve District, which is in New York State, the seventeen counties in Northern New Jersey and Fairfield County, Connecticut. New

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Irvin Bussing—For Plaintiff—Direct.

York State, of course, is the major item in that figure. I have to explain these figures,

We take the amount of sales in the period 1935 to 1939 as 100 percent. That is called the base period. Then we relate the actual sales in other years to the sales during that base period to determine the increase or decrease from that base period.

According to that measurement in 1933 department store sales were 86 percent of that base period 1935 to 1939. 86 percent in 1933.

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In 1943 department store sales were 134 percent of the base period.

In other words, from 1943 to—from 1933 to 1943 there is a spread of 48 points in the index. 48 points higher in 1943 than in 1933, using the 1935-1939 period as the base period.

Q. Going back to the figures you gave us with respect to employment, that figure of weekly wages prevailing in 1943 as the amount of weekly wages, how does that figure compare with any previous figure in the history of the State of New York? A. The 1943 figure also is the high for all time.

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Q. Now, I think you have some figures on the average number of wage earners in the State of New York engaged in manufacturing. A. When I said a moment ago there was an increase of 92½ percent of the number of workers, I didn't give the actual number because I didn't think you were interested in those figures.

The actual number of workers employed in manufacturing in 1933 in New York State was 323,071, and in 1943 the number had increased to 735,265.

Q. Are those figures an all-time high for New York State? A. Yes, sir, they are.

Q. What figures have you with respect to the cost of living in the comparable period or the same period? A. I will have to take the year 1935 instead of the year 1933 because we don't have that figure for 1933 for New York State.

In 1935—again I am taking the period 1935-1939 as the base period, and I am comparing conditions today with that base period.

Q. Well, the reason why you are doing that is because that is the index which is furnished by the Department of Labor? A. Yes, sir, New York State.

Q. That is the base period on which they project their figures of improvement or lack of improvement? A. Yes, sir.

Q. So you are tying your conclusions to the Department of Labor method— A. That is right.

Q. —of computing increase and decrease? A. That is right. Now, in 1935, in March, living costs were 98.9 percent of the base period.

In 1944, February, living costs were 124 percent of the base period.

I beg your pardon. I said that this was for New York State. These figures are for New York City. I can't get you figures for New York State because they are not published in the proper form.

However, I do know this: That the figures in New York State as a whole are substantially the same as those for New York City. We have figures for New York State as a whole now. I didn't have them in 1935. And the variation was inconsequential.

Q. In other words, you would say that the figures indicate that the increase in cost of living in

New York City from 1935 to 1944 has been about 25.1 percent? A. That is right.

Q. Now, do you have some figures with respect to occupancy of real estate, of dwellings in the City of New York? A. Yes, sir.

Q. And the percentage of vacancies in such housing in 1933 as compared to 1943 and 1944? A. Yes, sir. I have figures here for the State of New York derived from figures in Albany, Buffalo, New York City, Rochester, Syracuse and Utica.

And in 1933 in all of those cities combined the residential vacancy was approximately 7.8 percent and in Brooklyn, for which I happen to have the figure, the occupancy or the vacancy was 9.5 percent.

In the year 1942-1943—I am using figures for 1942 for some cities and 1943 for others because the census material doesn't always coincide. Not all cities take their figures of vacancies at the same time. But in 1942-1943 in New York State cities generally the vacancies were 2.6 percent, and in Brooklyn 4.0 percent.

Q. You have no further figures on vacancies in New York State? A. No further census have been taken officially since those dates.

Q. You have figures of tax delinquencies? A. Yes, I have. In 1933—taking again those same six cities I referred to a moment ago—the average tax delinquency was 17.3 percent of the total taxes levied; and in 1942—the last complete year for which we have figures—the average was 4.8 percent delinquent.

Q. Is that a correct report to accept of the tax delinquencies which you read in the New York Times this morning in the report given to the people over the radio by the Mayor of the City of New York? A. Yes, sir.

Mr. McGrath: I offer it in evidence.

Mr. Collier: I object to it.

The Court: I would like to see it.

Mr. McGrath: I realize it may not be the best form of authenticated evidence. I could probably get the report of the City Collector over here. That summarizes it.

The Court: Yes, I think that would be better.

Mr. McGrath: That is if the objection is upon the ground that the matter offered is not properly authenticated.

Mr. Collier: I press the objection.

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The Court: Yes, I will have to sustain the objection.

Mr. McGrath: May I ask your Honor to reserve decision on that for this reason? This is probably a matter which will bear on the judicial notice, and I am going to make an effort to get the report over here. I expect to have somebody from the City Government testify.

The Court: The report will probably be available. At least it looks so from the article. This is the report made by the City Collector to the City Treasurer.

Mr. McGrath: I want to prevent myself from being precluded from asking your Honor to take judicial notice of it on any ruling in the record.

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The Court: Yes.

Mr. McGrath: I will mark it for identification.

(Marked Plaintiff's Exhibit 3 for Identification.)

Q. Now, you have got some figures of the New York Real Estate Board with respect to sales of real estate and foreclosures? A: Yes, sir.

Q. Tell us what you have on that. A. Of conveyances, which excludes foreclosures, there were in 1933 5,751 such conveyances, and in 1943 7,818, or an increase of 36 percent.

Q. That is covering Manhattan, is that right? A. Manhattan only. As to foreclosures in Manhattan, in 1933 these amounted to 1,769, and in 1943 600, or a decrease of 66 percent.

Q. Do you have some figures with respect to the decreases in mortgages in savings bank portfolios? A. Yes, sir.

Q. Please give us those figures and tell us what period they cover, and so forth. A. The best way I can present those figures would be to give you the amount of reduction in the mortgage portfolio in the year 1933 of the savings banks and then to indicate the deficiency in the volume of mortgages held by savings banks as compared with the legal maximum amount of mortgages which savings banks may hold under Section 235, paragraph 6-D of the Banking Law.

Q. The provisions of the Banking Law provide savings banks may not invest more than 65 percent of their total assets in bonds secured by mortgages on real property, is that correct? A. That is right.

Q. In your experience, from your knowledge of the practices of savings banks, when there was a normal mortgage market, was it the general practice of savings banks to invest pretty close to the limit?

Mr. Coller: That I object to.

By the Court.

Q. Have you any figures on that? A. Yes, sir, I have.

The Court: All right. Instead of the practice, we can get the figures. Give the percentage.

The Witness: The form in which I have my figures indicates that if the banks were to increase their mortgage portfolio up to the 65 percent referred to they would have to have \$1,110,000,000 of additional mortgages in this State.

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Mr. Collier: I move to strike that answer out.

The Court: I will allow it. How much is that?

The Witness: \$1,110,000,000 is the deficiency. The actual amount in mortgages held by the savings banks as of January 1st of this year was \$3,034,046,363, and the total permissible amount under the 65 percent rule would be \$4,276,350,000.

Mr. Collier: May I have that figure repeated, what the actual outstanding is?

The Witness: The actual outstanding as of January 1, 1944—I beg your pardon. I said three billion. That should be stricken. The figure should be \$2,976,849,885.

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Mr. Collier: May I ask one question about this figure? You refer to January 1, 1944, of the actual mortgages that were issued by the savings banks as \$2,976,849,000?

The Witness: That is right.

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Irvin Bussing—For Plaintiff—Direct.

Mr. Coller: 849. And the authorized amount would be according to your statistics \$4,276,350,000?

The Witness: That is right.

By Mr. McGrath.

Q. Well, what percentage of the total assets of the savings banks in the State of New York is presently invested in mortgages?

Mr. Coller: I think we had that.

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A. That is \$2,976,000,000.

Q. That is dollars amount. I said what percentage.

Mr. Coller: Oh.

A. Well, I better calculate that before we put it in the record.

Q. All right. A. I haven't got it calculated here.

Mr. Coller: Would it be about 45 percent?

The Witness: It is approximately that. 45 or 46 percent.

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Q. Would it be correct to say that approximately 20 percent of the total assets of the savings banks of the State of New York can under the law be invested in mortgages at the present time if such mortgages were available and if it were the disposition of savings banks management to so invest that money? A. That is true. And in addition to that it is growing each year because the annual amortization of mortgages in

the portfolio provides additional funds for investment. The amortization in 1933 alone was \$145,800,000.

Q. \$145,000,000? A. \$145,800,000, which, of course, comes out of the mortgage account; and if it is not replaced with mortgages then it decreases the portfolio, the mortgage portfolio.

Mr. Coller: What was the amortization for 1943?

The Witness: For 1943, \$145,800,000.

Q. In other words, the savings banks of the State have to invest \$145,000,000 in mortgages every year just to keep even? A. That is so.

Q. Now, have there been— A. I might say I see here on my record—you asked me a moment ago what the percentage of the mortgage account was to total assets in 1933. It was 61 percent of the total assets.

Mr. Coller: In 1933?

The Witness: Yes, sir. The mortgage and real estate account together was 61 percent of the total assets in 1933.

Mr. Coller: Your Honor, I think we could get it much better if you would permit me to adjust myself. We may as well have the percentage for 1944 if he has it there.

Mr. McGrath: He said about 45 percent.

The Court: He said he has to calculate.

The Witness: I can calculate it.

Mr. Coller: He said 45 percent difference there was.

The Witness: No, 45, 46 percent is the proportion now on my recollection of total assets.

Mr. Coller: I will take 45 or 46 percent. I am satisfied.

The Witness: I wouldn't want to put it in the record unless I got a chance to check this carefully. (Witness writes on paper.) 48 percent.

Q. Have you any other figures there that I didn't ask you about, doctor? A. There is one further indication of the fact that the savings banks of New York State are in need of the additional mortgage investments. I might call attention to the fact that about \$100,000,000 of mortgages, mortgage loans, have been taken by the savings banks in New York, located in New York State, on properties located in Pennsylvania, New Jersey and Connecticut during the past twelve months, in response to legislation which was enacted in 1942 by the Legislature, as I recall it.

And the prices paid for loans in those areas run as high as 103 $\frac{1}{4}$ percent. Those are F. H. A. loans, which reflects a yield after servicing charges of 3.75 percent on 25-year loans; 3.69 on 20-year loans; and 3.59 on 15-year loans.

In addition to the fact that savings banks are reaching out into these States for loans, they also have set up a corporation known as Institutional Securities Corporation, which has the power to use savings bank money to make loans anywhere in the United States provided those mortgages are insured by the Federal Housing Administrator; and about \$7,000,000 of such loans have been made in the last two years.

Q. Is this legislation extending to the savings banks the right to go outside of the territory of

the State of New York to make loans sought by the savings banks in order to extend their area of mortgage investment, doctor? A. Yes, sir.

Mr. Coller: I object to that and move to strike it out.

The Court: I will allow it.

By the Court.

Q. You know this as an expert? A. Yes, sir.

Q. Was it through your organization? A. Yes, sir.

Q. That this legislation was sought? A. Yes, sir. 158

By Mr. McGrath.

Q. Or course, it is also through your organization that many of these loans are procured at the present time, having in mind that the Institutional Securities Corporation is an affiliate of the Savings Bank Trust Company? A. It is a sister corporation with a common board of directors.

Q. How is the stock of the Institutional Service Corporation owned? A. Owned entirely by the savings banks of the State of New York.

Q. So the Savings Bank Trust Company and the Institutional Securities Corporation really compliment each other in the services that both companies render to the savings banks of the State? A. The Savings Bank Trust Company is primarily a discount bank on short-term loans. The Institutional Securities Corporation is a mortgage bank for the savings bank on long-term loans. 159

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Irvin Bussing—For Plaintiff—Direct.

Q. Have you any further data that I haven't asked you about? If you have, I wish you would remind me. A. On the interest rates, did you want to bring anything in on the interest-rate trends in Manhattan?

Q. Yes. I would like to have those figures if you have them. A. I can't go back to 1933 because the figures are not available; but I can give you the figures for 1935, which don't differ very much from the 1933 figures.

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In Manhattan the average interest rates on new first mortgage investments, not including purchase money mortgages, in 1935 was 4.74 percent; in January, 1944, 4.21 percent.

Q. Do those figures indicate a constant decline in interest rates on new first mortgages taking place from 1935 to 1944?

Mr. Coller: I object to that. The figures speak for themselves.

The Court: Have you the figures in between 1935 and 1944?

The Witness: Yes, sir.

Mr. Coller: 4.74.

The Witness: I can give you the figures by years if you would like to have them.

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Mr. Coller: I am using the figures he gave. He said 4.74 and 4.21 between the nine years.

The Witness: It isn't a constant trend. There have been variations.

By Mr. McGrath.

Q. Suppose you give us the figures. A. 1935 is 4.74. 1936 is 4.34. 1937 is 4.47. 1938 is 4.40. 1939 is 4.25. 1940 is 4.22. 1941 is 4.10. 1942 is

4.20. 1943 is 4.24. 1944, the month of January, 4.21.

Q. During the years following December, 1941, there has been no new building construction except for purposes connected with the war, is that correct? A. Predominantly.

Q. So that your interest rate figures for 1942, 1943 and 1944 would relate to presently existing construction rather than to new construction by and large, is that correct? A. Yes.

Mr. McGrath: No further questions.

Cross-examination by Mr. Coller.

Q. All these figures you have given us are not made from your personal investigation, is that right? A. Some of them are my own investigation, but most of them are from other sources.

Q. And you don't employ any staff to make these investigations personally and report to you, do you? A. Field investigations?

Q. Field investigations. A. We don't make very many field investigations. Occasionally we do.

Q. That is on very rare occasions? A. Whenever a specific job is given to us by a savings bank.

Q. That would be only in an individual case some investigation with reference to any particular matter, is that right? A. Yes.

Q. You make a personal investigation? A. Yes.

Q. Otherwise you take statistics compiled by other organizations? A. Yes, sir.

Q. In 1933 we were in a heavy depression at that time, weren't we? A. Yes.

Q. And there was a lot of unemployment during that year? A. Yes, sir.

Q. People were on relief. Did you look into that matter in 1933? A. Yes.

Q. And people are still on relief, is that right? A. No, sir.

Q. Did you say yes or no? A. Relief was discontinued in 1943, July 1st.

Q. Are you positive about that? A. Yes.

Q. Don't you know there is a Welfare Department still in existence and operating here in the City of New York? A. There isn't any so-called W. P. A. or Federal funds for relief.

Q. I didn't ask you about the W. P. A. I said, the City Municipal Department is still being maintained, the Welfare Department, supporting people and keeping them on relief, is that right? A. I don't know.

Q. Are you positive about that? A. Yes, sir.

Q. You are sure you couldn't be mistaken? A. Do you mean relief projects or do you mean family assistance?

Q. Whatever you care to term it, family assistance or not, it is the same assistance that was given in 1933 and is still continuing by that same department at present. A. I presume there are family relief cases, yes.

Q. In other words, there is still in existence by the City of New York the Welfare Department?

A. I presume so.

Q. To this very day? A. I presume so. I haven't made any investigation of it.

Q. Have you ever made an investigation about that? A. Family relief?

Q. Yes. A. In New York City?

Q. Yes. A. No, sir.

Q. You haven't any figures as to what the family relief was at any time between 1933 and 1944?

A. I have no figures, no, sir.

Q. Now, in 1933 you said there was a vast amount of money withdrawn from the savings banks; is that right? A. Yes, sir.

Q. By the depositors? A. Yes, sir.

Q. And can you give us exactly the amount? If you have those figures, what they withdrew in 1933? A. For savings banks the amount withdrawn over the amount deposited was \$392,000,000.

Q. \$392,000,000? A. Yes, sir.

Q. And that was withdrawn in cash during the year 1933? A. Yes, sir.

Q. Now, in 1933 that was withdrawn, that vast amount; there was no unusual purchases that you know of? A. Of course, we don't know what the people do with the money they get. All we can do is to take the department store figures and base our contention on that.

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Q. That is what I am referring to. A. Yes.

Q. Were sales any greater in 1933 than in 1932?

A. They were less.

Q. They were less in spite of the heavy withdrawals? A. Yes, sir.

Q. Would you say, then, that persons who withdrew that money hoarded it or put it away in vaults or safety boxes? Would that be your conclusion as an expert? A. It is quite possible that much money in 1933 went into hoarding. We don't know how much.

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Q. Of course, there is no means of telling? A. No.

Q. But that would be the natural conclusion?

A. Quite possible.

Q. Then, after that there was a law passed whereby deposits were guaranteed or insured. is that right? A. Yes, sir.

Q. To the extent of \$5,000? A. Yes, sir.

Q. And then, money came flowing back to the banks, isn't that right? A. Yes.

Q. And would you feel that some of these \$917,000,000, or whatever figure you gave, came back to the banks then? A. Much of it. I don't have the figure for the intervening years before me.

Q. Some of it would be reflected in subsequent deposits? A. Yes.

173 Q. And you wouldn't say, then, by reason of these vast deposits coming in subsequently that there was an era of prosperity where hoarded money was put back? A. Well, we have the indexes of business activity and, of course, those show a definite improvement from 1932 on, 1933.

Q. Conditions did somewhat improve? A. Yes.

Q. From 1933? A. Yes.

Q. In the banks, in every industry? A. Yes. But I wouldn't want to say that I think the improvement in bank deposits can be explained in terms of a return flow of hoarded currency because that is not the case.

Q. I didn't get that. A. I say I wouldn't like to imply an increase in bank deposits can be explained in terms of a return flow of hoarded currency.

174 Q. But that helped somewhat? A. Yes, undoubtedly that augmented the stream and the flow of currency.

Q. Of course, when there was a run on the banks—we call it a run on the banks—in 1933, is that right? A. Yes.

Q. And as a result of that many businesses suspended; isn't that right? A. Yes.

Q. They went out of operation, and as we stated before, money was taken out of banks and hoarded? A. Yes.

Q. And when the law was passed insuring the deposits to the extent of \$5,000 for each individual account money gradually came back? A. Yes.

Q. Business was reestablished? A. Yes.

Q. New enterprises were entered into? A. Yes.

Q. And re-employment was resumed; isn't that so? A. Yes.

Q. And as business was closed in 1933 employments were suspended, which is the natural course of events? A. Yes.

Q. When you gave us the data that the pay rolls were increased between 1933 and 1943 to the extent of 266 percent, that was due to the fact that we came out of a very deep depression into normal and better conditions, isn't that right? A. Yes.

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Q. And in the talk about 1943, during a portion of that time we were engaged in war? A. Yes.

Q. And in unusual enterprises and unusual activity? A. Yes.

Q. And an unusual amount of employment? A. Yes, sir.

Q. And so much so that even women were employed extensively? A. Yes, sir.

Q. As a matter of fact, this percentage that you state, the greater portion of it was female employment, is that right? A. I am not prepared to say it.

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Q. Would you say it offhand without any preparation? A. You mean the greater—the increase was to be explained in terms of employment of women?

Q. Women more than men during the years of the forties? A. That 266 was not the number of workers. That is the pay roll. That is the amount of money in the weekly pay roll.

Q. Yes. A. We have an increase in the number of wage earners.

Q. 93½? A. That is right.

Q. 92½ percent was the increase of employment in the period of ten years? A. Yes. I think that is a problematical question. I can't answer that without reference to the basic data.

Q. You wouldn't care to state it? A. I don't think I can say anything that would have any value on that point because my figures don't throw any light on the question.

179 Q. You haven't those figures? A. Not at the moment. I can get them.

Q. Now, the earnings between 1933 and 1943 increased from \$21 to \$44.68 per capita, is that right? A. Yes, sir.

Q. And that also includes the years that we are in the present conflict? A. Yes, sir.

Q. And as a result of this conflict there are people working overtime? A. Yes, sir.

Q. And on Sundays and holidays, is that right? A. That is right.

Q. And there are regulations where they get double pay for that type of work? A. Yes, sir.

180 Q. And some of the work is different from what was performed in normal years where we were not in war, so the pay is slightly higher? A. Yes, sir.

Q. We have also had legislation regarding labor questions so as to regulate the pay of such people, and this brought it up to a higher scale in 1943? A. Yes, sir.

Q. And all this must be taken into consideration in coming to a conclusion there has been an increase from \$21 to \$44.68 during that ten-year period? A. That is right.

Q. Now, we have the question of sales. They materially increased in 1943? A. Speaking of real estate or department stores?

Q. No, department store sales. A. Department store sales, yes.

Q. Have you got that before you? A. That is right.

Q. And you said in 1943 they had increased to the extent of 134 percent? A. Of the base period, that is right.

Q. Of the base period. The base period being from 1935 to 1939? A. Yes, sir.

Q. And a portion of the base period we were in a heavy, deep depression; isn't that right? A. Yes, sir. 182

Q. And as a result of that there was a lot of unemployment? A. Yes, sir.

Q. And there being unemployment, people did very little buying? A. Yes, sir.

Q. They hadn't the funds? A. Yes, sir.

Q. And they had neglected to replenish things that they needed due to the fact they didn't have the funds? A. Yes, sir.

Q. That is a natural inference? A. Yes.

Q. And as funds came into their possession the buying was extraordinarily heavy during such periods when funds came into their hands, is that right? A. That is right. 183

Q. Now, of course, on the theory of supply and demand, when there is demand prices of commodities go up; that is right? A. Yes, sir.

Q. That is when the costs go up? A. Yes.

Q. And that is the basis for the cost of living going up after your base period from 1935 to 1939 to 1944, when it was 124 percent? A. Yes, sir.

Q. You say above the base period? A. Yes, sir.

Q. And the base period covers a very unusual period of hard times? A. Well, I guess 1935 was a tough time. By the year 1936 we had almost gotten back to a period of prosperity, one might say. Then, of course, we had a recession again in 1937, and then 1938 and 1939 were years of moderate business activity.

It was a fairly representative period. It was almost a cycle in itself, we might say.

Q. Being there was a depression cycle at times during that base period— A. Yes.

Q. —naturally the prices of commodities fell very low? A. Yes, sir.

Q. You stated in the State of New York the bonds, the War Bonds, were purchased to a greater extent than anywhere else? A. Yes, sir.

Q. And, of course, there is more activity in the State of New York with reference to war industries than anywhere else, is that right? A. No, sir.

Q. You wouldn't say that? A. No, sir.

Q. Well, to a great extent we have quite some activity here? A. Yes, sir.

Q. And new plants have been opened extensively for the purpose of manufacturing war commodities? A. Yes, sir.

Q. And as a result of it we have had heavy employment? A. Yes, sir.

Q. And you know this to be a fact, in all these plants there are regulations that each employee buy a certain amount of bonds and they take that from his payroll? A. There are payroll deduction plans, yes.

Q. In quite a number of plants? A. Yes, sir.

Q. Now, did you say that the occupancy of apartments in New York had increased over your

base period to any material degree? A. I gave the figures in the form of vacancies.

Q. Yes. You gave us 7.8 percent vacancies in 1933. Is that right? A. That is right, 7.8 percent.

Q. Seven what? A. 7.8 percent.

Q. That is right. A. Vacancies from 1932 to 1935, various dates being used for this census. You see, in one State the census might be taken in 1932; in another State it might be taken in 1933. I have to take the period 1932 to 1935 to get my average.

Q. Looking at your chart, when was the heaviest period of vacancy? A. 1932 to 1935.

Q. 1932 to 1935? A. Yes, sir.

Q. What was the percentage at that time? A. 7.8 percent.

Q. In other words, apartments available for any purpose between 1933 and 1935, 7.8 percent of those apartments were vacant? A. Yes, sir.

Q. Did they increase after 1935? A. They went down each year after that period until 1942-1943.

Q. You said in 1933 in Brooklyn there was 9.5, is that right? A. That is right. Brooklyn was 9.5.

Q. In other words, Brooklyn was slightly greater than Manhattan? A. That is right, yes.

Q. Then, from 1935 there was a gradual increase? A. There is only three years during which we were able to get figures. One is the 1932-1935 period. The second is the year 1940. And the third—

Q. Just one year? A. Just one year, 1940. That is when the census was taken.

Q. You have 1933-1935? A. Yes. The third period is 1942 to 1943. Those three periods.

Q. Let us stick to 1940. A. 1940, you want?

Q. Yes. A. 1940?

Q. Yes. A. New York State, 5.8 vacancy, and in Brooklyn 5.8.

Q. Then you have a period 1942 to 1943? A. That is right. New York State was 2.6.

Q. Brooklyn 4? A. Brooklyn 4.0.

Q. Do you know what it is at present? A. We don't know. Nobody has taken the census.

Q. Now, will you say that to a great extent this improvement is due to the fact of the war and the re-employment? A. To a substantial degree, yes.

191 Q. To a substantial degree? A. Yes.

Q. Are the savings banks anxious to have mortgages? A. Yes, sir.

Q. That is the main means of investing their money? A. It is one of the two primary methods.

Q. What is the other primary method? A. Obligations of the United States Government and corporations.

Q. In other words, they may invest up to 65 percent in mortgages? A. Yes, sir.

Q. And the return on those mortgages is better than the average investment? A. Yes, sir.

Q. On Federal funds they have an average of 2 percent or less, whereas on this they vary from 4 to 6? A. That is a gross figure.

Q. Gross, yes. A. There isn't much expense in handling a bond account, but there is some expense in handling a mortgage account.

Q. In other words, if a mortgage is a good security a bank likes to maintain that mortgage? A. Yes.

Q. Particularly if it is getting 6 percent? A. Well, that would depend upon the purpose the bank has in mind in running its mortgage port-

folio. It isn't only the rate of interest. It is the rate of amortization, the character of the property, and so on.

Q. Well, if the character of the property was a good investment in 1920, also in 1930, would it be a good investment today where there is a scarcity of property and building? A. Oh, I will say——

Q. Let me put it this way. I withdraw that question. There is very little building going on now, is that right? A. Yes, sir.

Q. Due to priorities? A. Yes, sir.

Q. And as a result of it the property has enhanced in value to some extent? A. Well, again this is not my field. I will give you my opinion, however. That is, if there is some question, property is advancing more than it is depreciating, there is two things at work. There is the increase in value due to the growing scarcity, and one is a decrease in value due to obsolescence and depreciation.

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Q. Land values, eliminating the structure, the land values have increased to some extent, is that right? A. Well, I wouldn't say that.

Q. Would you say the land and the structure, where there is a scarcity in building, would increase naturally? A. Certain types.

Q. And, particularly where there is a shortage of available apartments for rent it would increase the values of other apartments? A. Well, strangely enough, buildings with inadequate sanitary facilities are not well rented today, whereas the new law tenements are very highly rented.

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This vacancy thing we have in New York City, for example, is colored by the fact that the old law tenements, so to speak, are vacant to the ex-

tent of roughly 16 percent, I would say offhand, whereas the new law tenements are not vacant to any more than, say, 1 or 2 percent. It depends on the type of building entirely.

Mr. Coller: That is all.

Mr. McGrath: That is all, doctor.

The Court: We will take a recess until 2 o'clock. We have to recess at 3 o'clock this afternoon. So I want you gentlemen to know it so you can guide yourselves accordingly.

Mr. McGrath: We are subpoenaing some other records, and we will subpoena them for tomorrow morning. I haven't got any more work today than to take up to three or a little before. I think we can finish a little before.

The Court: All right.

Mr. McGrath: I will bring in anything else tomorrow morning. I believe we will finish tomorrow morning.

The Court: All right.

Mr. McGrath: I would like to say this to your Honor. I have an application returnable before Judge Kleinfeld at 10 o'clock tomorrow morning, which I will have to attend to before we proceed with this trial, so I would like to have this case set down for 10.30 tomorrow morning.

The Court: Yes, I will do that.

(There was a recess taken for luncheon until 2 o'clock P. M.)

(The trial was resumed at 2 o'clock P. M.)

CHARLES PUNIA, 19 Exeter Street, Brooklyn, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. McGrath.

Q. Mr. Punia, what is your business? A. Real estate.

Q. How long have you been engaged in the real estate business? A. Twenty-four years.

Q. What is the name of your business organization? A. Punia & Marx.

Q. And do you have your place of business here in Brooklyn? A. That is right.

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Q. And is that where your activities are substantially that you are engaged in? A. That is right.

Q. You have been specializing in the placing of mortgage loans on properties within the City of New York in recent years? A. That is right.

Q. For how many years? A. Twenty-four years; upwards of twenty-four years.

Q. Do you place loans with various institutions? A. That is so.

Q. Have you found in your experience that mortgage money is readily available from all types of lending institutions at the present time?

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Mr. Coller: I object to the question.

The Court: Yes, sustained.

Mr. McGrath: Does your Honor sustain the objection?

The Court: Objection sustained.

Mr. McGrath: Exception.

Q. Can you tell us roughly how much money you have placed with lending institutions on

bonds to secure mortgages on real property within the City of New York during the past year? A. Upwards of \$8,000,000.

Q. Generally, what was the type of property securing these loans? A. Improved property.

Q. Residential type? A. Residential as well as industrial.

Q. These loans embrace multiple family dwellings? A. That is right.

Q. As well as smaller units? A. That is right.

Q. Have you been engaged to any substantial extent in the refinancing of existing mortgages?

203 A. That has been primarily our business since the war.

Q. What percentage of the total loans placed by you in the last two years would you say involved refinancing of existing mortgages? A. Well, in its entirety.

Q. In other words, there being no new construction, your activities have been devoted primarily to refinancing loans on existing structures? A. That is right.

Q. How about the age of the buildings on which you have been placing the mortgages? Over what range in age would you say they cover? A. We cover buildings that were built prior to 1931. I would say buildings up to about thirty years of age.

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Q. Do you find that age in itself is any obstacle to refinancing existing mortgages? A. Oh, no.

Q. Is the mortgage loan market in your judgment improving?

Mr. Coller: I object to that.

The Court: I will allow that. You may answer that.

Q. I think it is getting better.

Q. Is the mortgage market in your judgment sufficiently favorable at the present time to permit the refinancing of any residential real property mortgages now existing at an amount which would fairly reflect the sound normal market value of the property provided the occupancy, location, and physical condition is such that a loan can be procured on it at all?

Mr. Coller: I object to the question.

The Court: I will allow it. He is an expert.

The Witness: May I ask you to repeat that, please?

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Mr. McGrath: Would you repeat it?

(The reporter repeated the last question.)

The Witness: I think it is.

Q. It is a fact, is it not, that lending institutions generally are empowered to lend up to 66⅔% of the fair market value of the given piece of improved real estate? A. That is so.

Q. Of course, there are some properties upon which such institutions would not lend at all, is that correct? A. That is right.

Mr. Coller: I object to that.

The Court: That is a matter of common knowledge. I will overrule the objection.

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Q. And the factors which might preclude any loan being made at all would be such as a dilapidated condition of the property, obsolescence, poor location, poor transit facilities, or poor neighborhood trend? A. Yes.

Q. Is that correct? A. That is right.

Q. Where such factors exist lending institutions might be discouraged from going into the areas at all, is that right? A. That is right. They would shy away from it.

Q. Excluding these elements which may provide an obstacle for the placing of any loan at all, would you say that any parcel of residential real estate not suffering from any of these elements can be readily mortgaged at a figure representing from 60 to 66 $\frac{2}{3}$ percent of its fair, sound, intrinsic value in a normal market? A. Definitely.

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Q. Are you familiar with the current value of real estate and the prevailing real estate market for residential properties? A. Yes, I am.

Q. You also act as broker in the sale of real estate, do you? A. I do.

Q. Are you familiar with the present market for one and two-family houses? A. Not too familiar.

Q. Do you know enough about it to be able to say whether there is an active market for that type of property? A. Oh, yes, the market is very active.

Q. Can one and two-family houses at the present time be readily bought or are they scarce? A. They are scarce.

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Q. Are they bringing good prices? A. They are.

Q. Would you say that the prices procurable for one and two-family houses in today's market represented the fair, sound, intrinsic value of the properties? A. I would think so.

Q. Do such prices represent the amount which a willing seller can procure from a willing buyer

-Charles Punia—For Plaintiff—Direct—Cross.

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without any compulsion on either side unless it be on the buyer's part? A. That is right.

Q. And are mortgage loans readily available from various lending institutions operating in this area at from 60 to 66 $\frac{2}{3}$ percent of such prices? A. Very readily available.

Mr. McGrath: Your witness.

Cross-examination by Mr. Collier.

Q. Mr. Punia, you are a member of the firm of Punia & Marx? A. That is right.

Q. Where is your place of business? A. 60 Court Street, Brooklyn.

Q. Do you own any real estate of your own? A. Well, I own real estate, but not individually. I own the stock of the corporation that owns the real estate.

Q. This firm is a corporation? A. This is a company.

Q. A partnership? A. That is right.

Q. And this partnership owns property of its own? A. Not individually. We own the stock of the corporations that own the real estate.

Q. Of the corporations that own real estate. In how many such corporations have you stock?

A. Oh, I would say a half dozen or more. At least a half a dozen.

Q. And each corporation has an individual parcel, is that right? A. That is right.

Q. Just a parcel for each corporation? A. That is right.

Q. And they constitute a half a dozen or more? A. That is right.

Q. So how many more? You say how many more. A. Oh, at least ten.

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Q. Your business is mainly brokerage business, isn't that right? A. That is true.

Q. And that means selling property and getting a commission on it? A. That is right.

Q. You are a licensed broker? A. That is right.

Q. So is your partner? A. That is right.

Q. And in the course of that business you attempt to place mortgages? A. That is not so. Primarily my business is placing mortgages.

Q. Placing mortgages? A. That is right.

Q. With institutions? A. That is right.

215 Q. You yourself don't loan any money on mortgages? A. Occasionally.

Q. Does your firm loan money on mortgages? A. The firm of Punia & Marx is strictly a brokerage, real estate brokerage firm.

Q. Individually, do you place it? A. Occasionally.

Q. How often are these occasions? A. I couldn't answer that. As often as the occasion would arise.

Q. How many mortgages are you holding now? A. About ten.

Q. Aggregating what sum? A. At least \$100,000.

Q. In your own name? A. In corporation names.

216 Q. Referring to the corporations that you mentioned originally? A. That is right.

Q. And some of those mortgages are "P. M." mortgages, purchase-money mortgages? A. Yes.

Q. A majority of the ten? A. No.

Q. How many of them are purchase-money mortgages? A. Two to my knowledge at the moment.

Q. You have no figures before you, have you? A. What kind of figures?

Q. As to what you testified? A. I don't quite follow the question.

Q. You stated that there was approximately \$8,000,000 in mortgages placed during the year 1943? A. Upward of \$8,000,000, I say.

Q. Is that based on statistics as you have examined them? A. That is right.

Q. What statistics did you have? A. My own records.

Q. Your own records? A. That is right.

Q. In other words, the records you carry in your office? A. That is right.

Q. And those records consist of what? A. 218
Records.

Q. Of mortgages you placed? A. That is right.

Q. Can you bring those records into court? A. Yes, I can.

Q. You didn't bring them with you today? A. I did not.

Q. How many of those mortgages are home loan mortgages? A. What do you mean by home loan?

Q. Mortgages placed on homes over a period of eighteen, twenty-five years? A. Oh, homes?

Q. Yes. A. 66.

Q. 66 percent of it? A. 66 mortgages.

Q. Home loan mortgages? A. That is right.

Q. What you call home loan mortgages? A. 219
When you say home loan mortgage I assume you mean a dwelling.

Q. That is right. A. 66.

Q. Now, you say the condition of mortgages have improved, is that right? A. That is true.

Q. And you are referring to improvement over what years, former years? A. Oh, yes.

Q. Now, when did this improvement start? A. When the improvement started?

Q. Yes. A. It started gradually from 1934 on and kept improving until——

Q. You would say in 1933 it was a very bad market, is that right? A. I would say in 1933 you had no mortgage market.

Q. 1934 was an improvement? A. 1934 just commenced.

Q. Go right through the years and tell us how they improved during the various years. A. I don't quite follow the question.

221 Q. You are a real estate man and you are familiar with mortgages, and it is your business to watch the market, that is the mortgage market, is that right? A. That is true.

Q. And you would naturally follow the market, being in business for twenty-four years, as it improved each year, is that right? A. That is right.

Q. Can you give us some idea as to what degree of improvement there was from one year to the next, starting with 1934? A. No; I am afraid I would have to resort to records for something like that, if such records are available.

Q. Have you such records? A. I do not.

Q. Are there such records available? A. I wouldn't know. There may be.

Q. You have never interested yourself sufficiently to find out if there was? A. Never.

222 Q. Then let us have your offhand opinion. What was the condition in 1935 over 1934? A. The market in 1935 was a little better than it was in 1934.

Q. 1934 was better than 1933, is that right? A. In 1933 there was no mortgage market to my knowledge.

Q. 1934 was a fair market. Was there an improvement? A. That is right.

Q. To what extent would you say the improvement was in percentage? A. I would only be guessing.

Q. Give us your best guess. A. I would say 100 percent improvement because in 1933 there was no market at all.

Q. That 100 percent improvement, how much mortgage money was available in 1934? A. How much was available?

Q. Yes. A. I can't answer such a question. I don't think anybody can.

Q. Are you sure you can't? A. I am positive I can't.

Q. Don't worry about anybody else. How about 1935 over 1934? A. It was much better than 1934.

Q. To what extent? A. I wouldn't know.

Q. 1936? A. Better than 1935.

Q. When you say better, to what extent? A. I wouldn't know.

Q. Would your answer be the same for 1937, you wouldn't know? A. Right up to 1941 my answer would be the same.

Q. All right. Then, in other words, up to 1941, you would say there was a gradual improvement, but you wouldn't know to what extent, is that right? A. That is right.

Q. Now, we will take 1941. And in 1941 you do know, is that right? A. That is right.

Q. Tell us what improvement there was in 1941. A. 1941 the market was better than it was in 1940 up until December 7th, when war broke out.

Q. Prior to December 7th, to what extent was there an improvement in 1941? A. I wouldn't know. I couldn't answer that.

Q. Then your answer is the same for 1941 as in the other years? A. Except the market was better in 1941 up to December 7th.

Q. Can't you give us any better idea of what "better" means? You say it is "better". What is the explanation? Was it a fraction of a percent or a large percent, or can you give it to us in dollars and cents? A. Can you clarify to me what you mean by "better"?

Q. You said "better". I am trying to find out from you what you mean by "better". A. There was more mortgage money available.

Q. To what extent? A. I would have to contact the treasurer of every institution to find out how much mortgage money they had available at every given period in order to be able to answer that question.

Q. You never made such contacts? A. Definitely not.

Q. Never at all? A. That is right.

Q. Everything you stated today is your own opinion? A. And my own experience.

Q. Based on your own experience? A. That is right.

Q. And if the experience of others were different, why, the conditions would be different?

Mr. McGrath: I object to that.

A. Oh, no.

Mr. McGrath: I object to that.

The Court: Sustained.

Q. In other words, that is your personal experience. Now, what was your experience in 1942? What was the condition of the mortgage market in 1942? A. Early in 1942 the mortgage market lagged a bit, but toward the latter part of 1942 it improved again.

Q. To what extent? A. As good as it was in 1941 prior to December 7th.

Q. Now, 1943, would you say anything about 1943? A. I beg pardon?

Q. How about 1943? A. 1943 was better than 1942.

Q. In other words, there was a gradual improvement in mortgage conditions in all these years? A. That is right.

Q. Now, had it reached at any time between 1934 and 1943 such a peak where you would say there was a normal condition as prevailed in normal times? A. Would I assume from that question that you have reference to the amount of mortgage money available?

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Q. Do you want to have the question read to you? A. Please.

(The reporter repeated the last question.)

Q. With reference to mortgages. A. I think there was an abnormal condition. There was more money around than there were mortgages available.

Q. Well, taking that abnormal condition, in other words, there was such a good mortgage market that you could get more even than you even wanted, is that right? A. I didn't say that.

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Q. What do you mean by "abnormal"? A. By "abnormal" I mean there was more money than there were—

Q. Applications? A. That is right.

Q. And when did that condition first present itself, there was more money than applications? A. In the middle of 1942.

Q. Was that condition also existing in 1941?

A. I would say so. Up until December.

Q. That was at the outbreak of the war? A. That is right.

Q. Then we had a little lull? A. That is right.

Q. Then we will go back before the war, in 1940. The war was in 1941? A. That is right.

Q. In 1940 how were conditions then; also like you stated, "abnormal", that there were more applications? A. No, there was a more staple market at that time.

Q. A staple market? A. Yes.

Q. Normal conditions? A. That is right.

233 Q. You could get mortgages if you wanted them? A. Provided you had decent underlying security.

Q. In other words, if you had fair security you had a good mortgage market? A. That is right.

Q. Would that also exist in 1939? A. Yes.

Q. Also? A. Yes, sir.

Q. Go back as far as you can; you know when to stop; without my asking each year; when was there such a condition there was not a sufficient amount of mortgage money available? A. When there was not a sufficient amount?

Q. Yes. Name any year. A. I believe it was 1932 and 1933.

Q. That was a very bad market? A. That is right.

234 Q. In 1934 you say you could get what you wanted? A. I didn't at any time mean to imply you could get what you wanted.

Q. On fair security. That was unfair. Fair security. A. You could never get what you wanted.

Q. Give us the year when it first presented itself. A. I didn't intend to say at any time and I don't think I did, you could get what you wanted.

Q. I will reframe the question. Assuming you had a good parcel, that the mortgagee thinks a good security for its investment, and it is willing to make its loan, everything else being agreeable, rates and everything being satisfactory, when between 1933 and the present date, when was the first time that such a mortgage market presented itself that you could go to a bank with good security, as I stated, and get mortgage money? A. From 1934 to the present day.

Q. You could always get it? A. That is right.

Q. On a good security? A. That is right.

Q. In other words, in 1934 there was no occasion, there was no emergency with reference to mortgage money, is that right? A. I don't know; maybe too much money might be considered an emergency.

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Q. I am trying to get from you whether you could get mortgage money on good security in 1934 when you made the application; anybody could get it? A. That is right.

Q. You could get it? A. That is right.

Q. I could get it; anybody could get it; you didn't need any influence to get it; all you needed was good security? A. That is right.

Q. That is true from 1934 to the present day? A. That is right.

Q. There has been no change? A. There has been.

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Q. Except for the period of the depression from December 7, 1941, to the spring or summer of 1942? A. That is right.

Q. Eliminating that period, there was always a time when you and I and the real estate dealer would call a good mortgage market? A. That is right.

Mr. Coller: That is all.

238 *Chas. Ponia—For Plaintiff—Redirect—Recross.*
Albert Hitchcock—For Plaintiff—Direct.

Redirect examination by Mr. McGrath.

Q. Just one question. When you spoke of home loans in answering the question you weren't referring to the homes of the Home Owners Loan Corporation? A. No. I had reference to dwellings, not multi-family houses.

Mr. McGrath: That is all.

Recross-examination by Mr. Coller.

239 Q. When I said that you stated there was a good mortgage market in 1934, was it as good as in 1943 for the purposes of getting mortgages? A. 1934 as good?

Q. Yes. A. No, it was not.

Q. It was not? A. No, it was not.

Mr. Coller: That is all.

ALBERT HITCHCOCK, 3358 154th Street, Flushing, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

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Direct examination by Mr. McGrath.

Q. Mr. Hitchcock, what is your business? A. I am chief statistician and assistant to the manager of the Group 5 Mortgage Information Bureau.

Q. Will you tell us what the Group 5 Mortgage Information Bureau is? A. Group 5 Mortgage

Information Bureau, is a service set up by the savings banks, certain of the savings banks, for the purpose of collecting and distributing information on mortgage and real estate matter.

Q. Now, the savings banks of New York State are recognized and divided into groups, is that right? A. Yes, sir.

Q. And the savings banks in the area of Brooklyn and Queens are in the group known as Group 5, is that correct? A. That area and also all of Long Island and, I believe, Richmond comprise the Group 5 area.

Q. The Group 5 is Brooklyn and Long Island and Richmond County? A. Yes, sir. 242

Q. Has the Group 5 Information Bureau prepared a group of statistics with relation to the mortgages held by savings banks in the Group 5 area? A. It has.

Q. Who is the head of the Group 5 Mortgage Information Bureau? A. The executive secretary is Mrs. Millicent Harkness.

Q. And were these figures compiled under her supervision? A. They were.

Q. You are the chief statistician in that office? A. Yes, sir.

Q. Is Mrs. Harkness available at the present time? A. She is not on account of an accident.

Q. She is confined to a hospital, is she? A. To her home. She is at her home. 243

Q. Due to an accident to her knee? A. Yes, she is.

Q. So she can't be here in court? A. That is right.

Q. Was there prepared in your office a series of figures entitled "A comparison of the total assets

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Albert Hitchcock—For Plaintiff—Direct.

of Brooklyn Savings Banks for the periods January 1, 1944, and January 1, 1936"? A. There was.

Q. And do these figures show the total assets of the Brooklyn savings banks, the amount of those assets which are invested in mortgages, and the percentage of those assets which are invested in mortgages as of January 1, 1944, and which were so invested as of January 1, 1936? A. Yes, sir.

Q. Do you have a similar compilation of all the savings banks in Group 5 as of January 1, 1944? A. I do.

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Q. Will you produce that sheet of figures, please? A. I have it right here.

Mr. McGrath: I offer it in evidence.

(Received in evidence as Plaintiff's Exhibit 4.)

Q. There was testimony here this morning by Dr. Bussing to the effect that savings banks are permitted by law to invest up to 65 percent of their total assets in bonds and mortgages. Does it appear from that exhibit what percentage of the total assets of the Brooklyn savings banks were invested in bonds and mortgages on January 31, 1936? A. 56.8 percent.

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Q. Will you tell us what percentage of the total assets of those savings banks were so invested as of January 1, 1944? A. On January 1, 1944, 38.6 percent of the total assets of Brooklyn savings banks were invested in real estate.

Q. What was the dollar amount? Did you say real estate?

Mr. McGrath: May we have the witness' last answer read?

(The reporter repeated the last answer.)

Q. You mean bonds and mortgages, do you?

A. That includes the bond and mortgage account and also other real estate.

Q. Other real estate being the real estate acquired by the institutions as a result of foreclosure sales? A. Yes, sir. It excludes, of course, the bank buildings owned by the various banks.

Mr. Coller: You mean where they operate?

The Witness: That is right. The place where they conduct the bank.

Q. Will you tell us what was the dollar amount which was available between the amount actually invested in bonds and mortgages and other real estate and the amount which could have been invested within the 65 percent limit first on January 1, 1936?

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Mr. Coller: I object to that, what could have been. Let us take what they actually did invest. What could have been is purely speculative.

The Court: He just wants the difference.

Mr. McGrath: I want the dollar amount between the actual percentage.

The Court: It is allowed.

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A. On January 1, 1936, there was available for investment \$107,477,148.

Q. How much was available on January 1, 1944?

A. As of January 1, 1944, \$454,453,859.

Q. Do you have the figures of all of the savings banks in Group 5 as of January 1, 1944? A. I do.

Q. Will you tell us what percentage of the entire Group 5, what percentage of the total

assets was invested in first mortgages and other real estate? A. Will you repeat the question, please?

Q. The percentage. A. I am sorry. I lost the continuity of thought.

Q. Do you know what the percentage was on January 1, 1944, of Group 5? A. The percentage to the total assets?

Q. Yes. A. 38.4 percent.

Q. How much was available in all the Group 5 savings banks as of that date for mortgage investment? A. \$542,000,000. This is the additional sum that was available, the balance available.

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Q. Yes. A. Over and above what was actually invested.

Q. That is right. A. \$542,031,257.

Q. Do you have a sheet showing the total real estate held by members of Group 5 savings banks as of January 1, 1944, showing the various types of real estate held, and the amount of the mortgage investment at the time of the foreclosure? A. I had a sheet showing the total held of Group Mortgage Information Bureau members.

Q. Yes. A. Which does not include every bank in the Group 5 area.

Q. How many banks does it include? A. It takes in 29 banks.

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Q. Out of a total of how many? A. Well, I can give you a breakdown of that. It takes in 17 Brooklyn banks out of 20, three Queens banks, seven Manhattan banks, and one Bronx bank, and one up-state bank.

Mr. McGrath: I offer that sheet in evidence showing the total real estate held as of January 1, 1944.

Mr. Coller: I fail to see the materiality of this.

Mr. McGrath: I will say to the Court I am going to supplement that exhibit by real estate figures held on previous dates which will show the manner in which the savings banks have been disposing of their real estate during this period.

The Court: Yes, I will allow it.

(Received in evidence as Plaintiff's Exhibit 5.)

Q. This exhibit shows that in Brooklyn as of January 1, 1944, there was a total overhang of savings banks' real estate of \$17,105,680. Do you have the total figure of real estate held by Brooklyn banks in 1939? A. As of the end of 1939, \$49,360,469.

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Q. Where have you taken that figure from?

A. I have taken that from the sheet here headed "Comparison of sales foreclosures and new loans of member banks from 1934 through 1943, together with a comparison of other real estate still held from 1939 to 1943."

Q. Now, at the beginning of 1939 the figure was \$56,041,181, is that right? A. That is correct.

Q. At the beginning of 1942 the figure is \$32,752,576, is that right? A. Yes.

255

Q. So that the figure between 1942 and 1944 is reduced from \$32,000,000 to \$17,000,000, is that correct? A. That is correct.

Q. Now, the figures you have just given us are taken from a compilation prepared in your office which shows a comparison of the other real estate held by savings banks, members of Group 5, also the foreclosures conducted by such banks, the

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Albert Hitchcock—For Plaintiff—Direct.

sales of real estate by such banks, and the new loans made by such banks, over a period from 1934 to 1943, is that correct? A. Yes, that is right.

Q. And that sheet also contains similar figures for Queens and Nassau as well, doesn't it? A. Yes, it does.

Mr. McGrath: I offer that sheet in evidence.

(Received in evidence as Plaintiff's Exhibit 6.)

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Q. Do you have a sheet showing the percentage of arrears on mortgages held by savings banks, members of Group 5, by semi-annual periods beginning October, 1935, and ending October, 1943?

A. Yes, I have such a sheet.

Mr. McGrath: I offer that in evidence.

(Received in evidence as Plaintiff's Exhibit 7.)

Q. Now, Mr. Hitchcock, the exhibit just introduced indicates that in October, 1935, 25 percent of the dollar amount of mortgages held by Group 5 members were in arrears. Is that correct? A. Yes, that is right.

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Q. And as of October, 1943, the same exhibit indicates but that 3 percent of the dollar amount of such mortgages were in arrears? A. That is right.

Q. Now, do you have a sheet containing figures showing the vacancies in apartments in six-story apartment houses constructed in the Borough of Brooklyn since 1934? A. I have such a sheet.

Mr. McGrath: I offer that in evidence.

(Received in evidence as Plaintiff's Exhibit

8.)

Q. Now, although this last exhibit gives the figures of six-story apartment houses constructed since 1934 in Brooklyn, the figures included in this exhibit begin with 1938, is that correct? A. That is correct.

Q. And that shows that there were 7 percent vacancies in 1938 with 0.7 percent in 1943. Right? A. That is right.

Q. Now, in the latter part of 1942 did the Group 5 Mortgage Information Bureau make a special study of the mortgages held by Group 5 savings banks in connection with the problem of whether the savings banks would join the Federal Deposit Insurance Corporation? A: Yes, they did, Mr. McGrath. 260

Q. And do you have before you a copy of the report which was prepared at that time as a result of that study? A. Yes.

Q. Did that study embrace the assembling of figures showing the total amount of mortgages held by Brooklyn savings banks and by Queens savings banks and the percentages of such mortgages which were on an amortized basis and those which were on a non-amortized basis? A. Yes, it did. It showed it at that time in two classifications, mortgages held in Brooklyn and mortgages held in Queens. 261

Q. I show you a chart which is labeled "Chart D" on page 10 of that report, and I ask you whether that chart shows in the form of sections in a circle, commonly characterized as a "Pie

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Albert Hitchcock—For Plaintiff—Direct.

Chart", the percentage of non-amortizing mortgages and those which are being amortized, with separate sections being provided for the various percentages of amortization? Is that correct? A. That is correct.

Q. The chart does show it? A. Yes.

Mr. McGrath: I offer it in evidence.

(Received in evidence as Plaintiff's Exhibit 9.)

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Q. I show you a chart designated as Chart "E" and ask you whether that chart contains the same information as the previous exhibit except that relates to Queens mortgages rather than Brooklyn mortgages? A. Yes, it does.

Mr. McGrath: I offer it in evidence.

(Received in evidence as Plaintiff's Exhibit 10.)

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Q. On the back of Plaintiff's Exhibit 10 there is a table entitled "Schedule 3", which purports to show the total mortgage portfolio of the Brooklyn and Queens savings banks covering loans made prior to 1935, broken down in the form of a table showing the number and dollar amount of mortgages non-amortizing and mortgages being amortized at various amounts. Those figures were prepared in your office and were embodied as a part of this report to which you referred in your testimony; is that correct? A. That is correct.

Mr. McGrath: I offer that in evidence.

(Received in evidence as Plaintiff's Exhibit 11.)

Q. Now, the figures shown in Plaintiff's Exhibit 11 indicate that about 31 percent—31.3 percent—of the mortgages held by Brooklyn savings banks were not being amortized in 1942 when those figures were compiled; is that correct? A. That is correct.

Q. They also show that 5.2 percent of such mortgages were being amortized not by payments at regular intervals but on some sort of a lump-sum basis; is that correct? A. That is right.

Q. Now, excluding the non-amortizing mortgages and the mortgages which were being irregularly amortized on a lump-sum basis, we have a residue of 63.5 percent of Brooklyn savings banks' mortgages which are being amortized on some regular basis or were at that time; is that correct? A. That is correct.

Q. And the dollar amount of that 63.5 percent of the mortgages was \$223,763,028, is that right? A. That is right.

Q. Now, I believe in that report you have a schedule called "Schedule 4", which breaks down the rate of amortization by dollar amount and percentage, which goes to make up that total figure of \$223,000,000 or 63.5 percent. Would you read off for us those figures, giving us first the percentage of amortization, then the dollar amount, and then the percentage of that dollar amount to the total of mortgages being amortized? A. One percent or less, \$12,268,208.

Q. Or? A. Or 5.48 percent of the total account.

1.1 percent to 2 percent amortization, \$58,868,537, or 26.31 percent.

2.1 percent to 3 percent amortization, \$83,327,242, or 39.92 percent.

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3.1 percent to 4 percent amortization, \$35,099,986, or 15.69 percent of the total account.

4.1 percent to 5 percent amortization, \$14,201,240, or 6.35 percent.

5.1 to 6 percent amortization, \$6,421,946, or 2.87 percent.

And over 6 percent amortization, \$7,579,870, or 3.38 percent.

Q. Going now to the Queens mortgages, we find from the table, Plaintiff's Exhibit 11, I think it is, we find 34.9 percent of the Queens mortgage are not on an amortizing basis; correct? A. I haven't got the tables before me, counselor.

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Q. (Counsel hands paper to the witness.) A. Yes, that is correct.

Q. And in addition, there were 11.1 percent of such Queens mortgages which were being irregularly amortized and on a lump-sum basis?

A. That is right.

Q. Excluding those non-amortizing and lump-sum amortizing mortgages, we have a residue of 54.1 of Queens mortgages which were being amortized on some regular basis in 1942 when these figures were compiled? A. That is right.

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Q. I think you have a table with respect to the Queens mortgages which contains the same data that you have just given us with respect to the Brooklyn mortgages. A. I have such a table.

Q. Will you give that data in the same form as you gave it with respect to Brooklyn? A. Amortization of 1 percent or less, \$3,095,758, or 3.46 percent of the total account.

Amortization of 1.1 percent to 2 percent, dollar amount, \$15,968,353, or 17.85 percent.

2.1 percent to 3 percent amortization, \$35,146,108, or 39.30 percent.

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Amortization of 3.1 percent to 4 percent, \$17,421,798, or 19.48 percent.

Amortization of 4.1 percent to 5 percent, \$10,339,140, or 11.56 percent.

5.1 percent to 6 percent amortization, \$3,314,123, or 3.71 percent.

And amortization on over 6 percent, \$4,149,788, or 4.64 percent.

Q. Coming back to Exhibit 11, which gives the figures of the mortgages which are on an amortizing basis and those which are not, in the Brooklyn and Queens savings banks, that table also indicates the percentage of the mortgage loans to the appraised value of the underlying real estate, does it not? A. Yes, it does.

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Q. And of the \$110,000,000 or 31.3 percent of Brooklyn savings bank mortgages not on an amortized basis we find that \$7,932,835 consists of mortgages on properties where the mortgage is less than 50 percent of the appraised value of the property; is that correct? A. Yes, that is right.

Q. We find further that \$26,017,678 of non-amortizing mortgages cover properties where the mortgage is somewhere between 51 and 66 $\frac{2}{3}$ percent of the appraised value of the property; is that correct? A. That is correct.

Q. So that would it be correct of the \$110,000,000 Brooklyn mortgages which are not being amortized, approximately \$34,000,000 are on properties where the appraisal is such that perhaps amortization would not be an imperative thing? A. That is right.

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Q. For the safety of the investment? A. That is right. Those are the so-called cream loans.

The Court: I will have to take a recess at this time.

Mr. McGrath: If I may ask one more question I will be through with this witness.
The Court: Go ahead.

Q. And with reference to the Queens properties we have \$5,316,141 mortgages on properties where the appraised value—where the mortgage is 50 percent or less than the appraised value; that is right? A. That is right.

Q. And we have \$23,806,318 of mortgages on properties where the mortgage is between 51 and 66 $\frac{2}{3}$ percent of the appraised value, is that right? A. That is right.

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Q. Now, that makes a total of \$29,000,000 Queens mortgages out of \$57,000,000 which are non-amortizing, where because of the underlying security it might not be imperative for the Queens banks to require amortization in order to protect this security; is that right? A. That is right.

Mr. McGrath: I think that is all of this witness.

The Court: All right.

Mr. Collier: Is there any way of my having copies of those exhibits over night?

The Court: Will you let him have copies over night?

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Mr. McGrath: I think we will let him take the original exhibits over night.

Mr. Collier: I would like them. Maybe it will shorten my cross-examination.

The Court: All right. That is fine. It is understood we go on at 10.30 A. M. tomorrow.

Mr. McGrath: 10.30 tomorrow.

The Court: All right.

(There was an adjournment until 10.30 A. M., May 23, 1944.)

Brooklyn, N. Y., May 23, 1944

10:00 A. M.

(The trial was resumed.)

Appearances: Same as before.

ALBERT HITCHCOCK, resuming the stand, testified further as follows:

Cross-examination by Mr. Collier.

Q. Mr. Hitchcock, there were several exhibits introduced yesterday based on your testimony. Have you copies of those exhibits there? A. I think I have.

Q. And will you look, take them out and look at Plaintiff's Exhibit 4, which is comparison of the total assets of the Brooklyn savings banks. Do you have them here before you? A. I have.

Q. Am I correct in stating that that reflects what amount of mortgages were placed during the years specified on that exhibit in comparison to the assets they had, is that right? A. No, it's not right.

Q. Well what is the 65 percent of total assets amounting to \$1,118,953,000? A. That is an arithmetical computation.

Q. That is a what? A. That is an arithmetical computation arrived at by taking 65 percent of \$1,721,462,004.

Q. That is correct. In other words, in 1944 the total assets of the Brooklyn savings banks amounted to \$1,000,000,000 and so forth that you have just stated, is that right? A. That's right, on January 1st.

Q. And 65 percent of that would be \$1,118,950,303, is that right? A. That's correct.

Q. And of this amount there was outstanding in the Brooklyn area mortgages and other real estate held by banks amounting to \$664,000,000, is that right? A. No, that's not right.

Q. Then I want to be corrected on that. How much of this money was out on bond and mortgage held by savings banks in 1944? A. Well, I figure, I have here \$664,496,444, represents the amount that was invested in bond and mortgage account plus other real estate held—not only in Brooklyn, but also in other areas.

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Q. Other areas? A. You specified Brooklyn. I say that—

Q. In other words, that was the amount invested by savings banks of Brooklyn in bonds and mortgages, whether of Brooklyn or other areas? A. In bonds and mortgages and other real estate property.

Q. That is right? A. That is correct.

Q. It may be 50 percent in Brooklyn and the other 50 percent elsewhere, you wouldn't know that? A. I wouldn't know from this statement. We have a record in our office on that.

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Q. Based on what we have as far as you have gone you would not know where the bonds and mortgages are located. I withdraw the question. That would then be 38.6 percent of its total assets were invested in bonds and mortgages and other real estate? A. That is correct.

Q. Both in the area of Brooklyn and other areas? A. That's right.

Q. And if it had invested this entire sum of 65 percent as authorized by law it would still have \$554,453,859 available for that purpose to them? A. Yes, those are the additional funds.

Q. Which it did not invest? A. Those are in addition funds.

Q. It could have invested? A. It could have invested.

Q. And did not invest? A. That is correct.

Q. And that applies as to 1944? A. As of January 1, 1944, that is the condition that exists.

Q. Now you have no such comparison, intervening comparisons between 1936 and 1944, have you, of each year? A. I do not have those records available at the moment.

Q. You have not those figures available at the moment? A. No.

Q. But you have on this paper which I am now reading from, marked Plaintiff's Exhibit 4, the paper that you have in your hand—the copy that you have in your hand, at least—figures which you give for the year 1936, is that right? A. That's right, for comparative purposes we set up the two years.

Q. For comparison purposes? A. That's right.

Q. In order to show the amount invested of capital in bonds and mortgages during 1936 as compared with 1944, is that correct? A. That's right; it shows a comparison between the two dates.

Q. And without going into the numerals there, it shows that in 1936 these same institutions had 56.8 of their total assets invested in bonds and mortgages? A. And other real estate.

Q. And other real estate. Also applying to the area of Brooklyn and other areas? A. Yes.

Q. In other words, that in 1936 there was approximately 19.2 more money invested in these same investments compared with their total assets, is that right? A. Well, I haven't worked that out on a percentage basis. It shows—

Q. In other words, let me put it this way: If 38.6 was invested in 1944 of its capital assets—
A. Yes.

Q. (Continuing)—and 56.8 was invested in 1936—that would be a difference of—what do you figure, about? A. That would be a difference of 18.2 percent.

Q. In other words, that 1936 was 18.2 percent more placed out on mortgages by these savings banks than as against their total assets as compared to 1944, is that right? A. Will you repeat that, please?

287 Q. In other words, that in 1936 these same banks— A. (Interrupting) As of January 1, 1936.

Q. (Continuing)—1936 these same banks invested a greater percentage of their total assets in mortgages than they did in 1944? A. That is not what it means at all, counselor.

Q. What does it mean? A. It means as of January 1, 1936, the Brooklyn banks had 18.2 percent more of their capital assets invested in bond and mortgage plus other real estate held than they did as of January 1, 1944.

Q. That's just what I mean, yes. In other words, on a percentage basis they had more money invested in mortgages in 1936 than they did in 1944, that is correct?

Mr. McGrath: That's right, we concede it.

A. That's right, yes.

Q. And in dollars and cents there were less total assets in 1936 in these banks than in 1944, is that right? A. That's right.

Q. And in dollars and cents there was more money invested in mortgages than in 1944, in dollars and cents? A. That is correct.

Q. In spite of the fact that the assets were smaller, that's right? A. Yes.

Q. Take your paper marked Total Real Estate Held by Group 5, Mortgage Information Bureau.

A. As of January 1, 1944, is that it?

Q. As of January 1, 1944. A. I have that.

Q. If we added all these figures it would practically come to the total mortgages as you had in Exhibit 4, the previous paper you looked at, is that right? A. Now, this paper here shows real estate held. It does not show bonds and mortgages at all.

Q. Oh, it is real estate held? A. That's right.

Q. By the banks? A. By the member banks.

Q. And that would mean real estate held for their own business purposes to conduct their banks? A. No, it isn't. The members in one case were dealing with all Brooklyn savings banks, in the last exhibit, in the second paper that you now refer to.

Q. Just members as a group? A. That refers to Group 5 Mortgage Information Bureau members.

Q. That is 29 members of the group? A. That's right.

Q. Twenty-nine, were they? A. I think so.

Q. I think you said 29. It would not make much serious difference. And what you have here marked Exhibit 5 would mean the real estate held by members of the group whether for their own business purposes— A. (Interrupting) No, it excludes banking houses.

Q. That would mean property taken in at foreclosure? A. That's correct.

Q. Now, banks don't usually buy real estate, do they, as far as you know? A. No.

Q. If they acquire real estate it is invariably through a foreclosure? A. Or a deed in lieu of foreclosure. Occasionally they acquire real estate for a banking house, but that's a rare procedure, a rare occasion.

Q. Now we will take Plaintiff's Exhibit 6, comparison of sales, foreclosures and new loans of member banks from 1934 to 1943. Have you that? A. I have that schedule before me.

Q. In there you have compiled all the foreclosures that have taken place from 1934 to 1943, to and inclusive of 1943, is that right, in the Borough of Brooklyn? A. That's right, by member banks.

Q. Also that Plaintiff's Exhibit 6 shows new loans placed in those respective years, doesn't it? A. It does, yes, sir.

Q. Now in 1934 there were more foreclosures than new loans, is that right, in the Borough of Brooklyn? A. In dollar amounts?

Q. In dollar amount. A. And also—yes, sir.

Q. And also in percentage? A. Yes, sir.

Q. Well, we will refer to the dollars. A. All right.

Q. Is that right? A. Yes. There were more foreclosures than new loans.

Q. In 1935 there were more foreclosures than new loans, is that right? A. Yes.

Q. And the foreclosures in dollars and cents amounted to \$20,709,545, is that right? A. That is right.

Q. As against \$4,923,910? A. That's right.

Q. An approximate excess of \$16,000,000 in foreclosures, is that right? A. Approximately, yes.

Q. We take 1936, and you find that the excess of foreclosures over new loans is approximately slightly over \$11,000,000, is that right? A. Yes.

Q. In 1937 the excess of foreclosures over new loans is approximately \$2,800,000? A. No, I don't agree with you.

Q. I mean \$800,000, rather? A. Yes, approximately \$800,000.

Q. In 1938 the new loans exceeded the mortgages, is that right?

Mr. McGrath: Foreclosures.

A. The foreclosures.

Q. The foreclosures? A. Right.

Q. As well as 1940, 1941, and in 1942 there is a slight drop as to variation, is that right, they still exceed to some extent? A. They still exceed but by a lesser amount.

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Q. And in 1943 you still had foreclosures amounting to \$7,282,513, is that right? A. That's right.

Q. And there was an excess of foreclosures in 1943 over 1942 to the extent of approximately \$400,000, is that right? A. Yes, that's right.

Q. In other words, there were more foreclosures in 1943 than in 1942 in dollars and cents. Nevertheless in all the years, however, between 1934 and 1943 the low on foreclosures was 1942 when the foreclosures still amounted to \$6,896,055, is that right? A. Well, 1934 was actually lower than that, slightly lower.

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Q. All right, I'll correct that. In 1934 the foreclosures were \$6,372,518, is that right? A. That is right.

Q. And in 1942, which was the lowest in the years between 1934 and 1943, the foreclosures were \$6,896,055? A. I think you mean between 1935 and 1943.

Q. Between 1935 and 1943, yes. That is correct.

A. That is \$6,896,055. That is lower than in any of the intervening years 1935 to 1943.

Q. In other words, that close to \$7,000,000 of foreclosures in Brooklyn were the very lowest that you had in all those years?

Mr. McGrath: He has already answered that, that's right. We concede that.

A. I have already covered that.

Mr. Collier: All right, it is conceded.

Q. Will you take up the paper called Six-story Apartment Houses Constructed Since 1934, Brooklyn. Marked Plaintiff's Exhibit 8. A. I have that.

Q. And that shows the number of buildings constructed since 1938, is that right? A. It shows them by years.

Q. Construction since 1934? A. Since 1934.

Q. Well, you have nothing marked on here prior to 1938. Does that mean there has been no construction prior to 1938? A. No, that does not mean that at all. As of October, 1938, there were 15,844 units which had been built since 1934.

Q. That embodies from 1934 to 1938? A. That's right. And in the next line, as of October, 1939, there had been 19,435 new buildings built since 1934.

Q. In other words, as you have each year designated there, it is cumulative? A. It is cumulative.

Q. And it includes it by years? A. Yes, sir.

Q. So that the best way of figuring is to take the bottom figure and that will give you your total?

A. That's right.

Q. Which would be 30,255 buildings, is that right? A. That's right.

Q. Have you the charts which you call pies? A. Yes, I have one.

Q. Turn to chart D, which is Plaintiff's Exhibit

9. Have you that? A. I have it before me.

Q. And that gives you a list of mortgages made prior to 1935, is that right? A. It does not give a list of anything, counselor.

Q. I mean it shows a graph of the mortgages held by these banks made prior— A. Yes, the entire pie represents the—

Q. City of Brooklyn? A. No, it does not. It represents all the mortgages made prior to 1935 and held as of December 31, 1942 by twenty-nine Brooklyn and Queens banks which participated in this study.

Mr. McGrath: The chart applies only to the Brooklyn banks, chart E.

The Witness: No, I correct you. Chart D refers to the mortgages held by Brooklyn, twenty-nine Brooklyn and Queens banks in Brooklyn, mortgages located in Brooklyn.

Q. And they were all made prior to 1935, however? A. They were.

Q. As shown by this chart? A. They were.

Q. And they were still held in 1942, is that the idea? A. That is right.

Q. You have nothing here to designate that they were still held, is that right? A. That's right. When it says now held, now means December 31, 1942, that is the date on which this was prepared.

Q. This chart was compiled? A. That's right.

Q. And these are all mortgages prior to 1935. You don't know just what years they were made

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*Albert Hitchcock—For Plaintiff—Cross.
Herbert E. Bode—For Plaintiff—Direct.*

prior? A. Well, some of them might be made in 1899, or some in 1934.

Q. You would not be able to tell from the chart whether they come within this moratorium law or not, would you? A. No, except I know they were made before 1935.

Q. That also applies to Exhibit 10, whatever you said with reference to Exhibit 9 applies to Exhibit 10, that is, Queens mortgages, is that right? A. That is right. Mortgages located in Queens.

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HERBERT E. BODE, of No. 213-15 Twenty-ninth Avenue, Bayside, Queens, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. McGrath.

Q. Mr. Bode, what is your business? A. Real estate broker.

Q. Where do you have your office? A. Long Island City.

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Q. And what is the name of your firm? A. Hosinger & Bode, Inc.

Q. And you're one of the active participants in that firm? A. I am, I'm the treasurer, treasurer and director.

Q. And you are a licensed real estate broker? A. I am.

Q. How long have you been engaged in the real estate business? A. Twenty-one years.

Q. You're at this time the president of the Long Island Real Estate Board, is that correct? A. I am.

Q. And when were you elected to that office?

A. As of January 1, 1944.

Q. What is the Long Island Real Estate Board?

A. It's an association of real estate brokers and allied people in industry, banks, and architects, lawyers—but principally real estate brokers.

Q. Now, in connection with your business do you place loans secured by real property with various institutions? A. I do.

Q. And do you also act as broker in the purchase and sale of real estate? A. I do.

Q. Have you found in your experience that mortgage money is readily available from all types of lending institutions at the present time?

A. Very readily.

Mr. Collier: I object to that.

The Court: I allow it as an expert.

Q. The answer is yes? A. Yes.

Q. And was it readily available in 1943? A. Yes.

Q. Now, directing your attention to the real estate situation so far as sales are concerned as distinguished from placing mortgage loans, have you been engaged extensively in the sale of real estate within the last year or two? A. Oh, yes, for the last ten years—well, as a matter of fact ever since we have been in business.

Q. Yes. A. But the—

Q. That is chiefly your business, the brokerage, or in connection with sales? A. Sale of property is one of them.

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Herbert E. Bode—For Plaintiff—Direct.

Q. How much property in dollar amount would you say that you brought about the sale of in the year 1943, have you any idea? A. Yes. About \$3,000,000 worth.

Q. Consisting chiefly of what type of real estate? A. Well, divided $\frac{1}{3}$ into one-family houses, and the balance in investment property such as taxpayers and apartment houses and smaller, may-be two-families and six-family houses.

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Q. Would you say that your office then handled as broker the sale of approximately \$1,000,000 for 1 small one-family house buildings? A. Very definitely.

Q. Through the Queens area primarily? A. Primarily, and some in Nassau.

Q. Have you found that during the year 1943 there was an active real estate market for the sale of that type of property? A. Yes, very active.

Q. Do you find that that active market continues right up to the present time? A. I do.

Q. Do you find that one and two-family dwelling houses can be readily bought today or are they scarce? A. They're quite scarce.

Q. Are they bringing good prices? A. Very good prices, yes.

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Q. Would you say that the prices procurable for one and two-family houses in today's market represent the fair sound intrinsic value of the property? A. Yes. It is my opinion that the prices are very fair.

Q. Very fair? A. Yes, sir.

Q. Do such prices represent the amount which a willing seller can procure from a willing buyer without any compulsion on either side unless it be on the buyer's part? A. I would say so.

Q. And in your experience have you found that mortgage loans are readily available on such one and two-family dwellings from various lending institutions at from 60 to 66 $\frac{2}{3}$ of the prices which such buildings are bringing today? A. With Savings and Loan a greater amount.

Q. The Savings and Loan associations have mortgage money available today? A. Up to 80 percent of their appraised value.

Q. Well, their appraised value is guided to a substantial extent by what the property brings on a current sale, is that so? A. I found that to be so, yes, sir.

Q. Now, do you also devote your time and the time of other members of your organization to the management of real estate? A. We do.

Q. About how extensive would you say this management business of yours is? A. Well, we have property, about four hundred buildings, under our management at the present time, which includes anywhere from a one-family house to a large six-story elevator apartment house.

Q. Now, in former years, subsequent to 1933 and prior to 1944, did you have a larger amount of real estate under your management? A. Yes, we did.

Q. Was that because it was more difficult to sell real estate in past years than it is in more recent years? A. Well, may I answer that this way: That during 1943 and 1944 many of the properties that were under our management were sold, and the purchasers elected to either manage it themselves or appoint a new managing agent.

Q. To what extent would you say that your management business has decreased in the last two and a half years? A. Possibly 25 percent. We

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Herbert E. Bode—For Plaintiff—Direct.

have retained a lot of management under sale as the reason for it. That isn't generally true.

Q. In other words, you were managing at least 25 percent more properties in the beginning of 1942 than you are managing now, is that correct?

A. That's correct.

Q. And is the reason for it that you have succeeded in selling those properties? A. That is true. Either we have or some other broker has, but the properties have been sold. That is the reason for the diminishing of the managing account.

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Q. Can you, according to your experience and your knowledge and observation of the real estate market, fix a time when the current active real estate market began? A. Well, it would be my opinion that the market improved at first gradually from 1936, possibly even 1935. It was very gradual then, we found—and I would say that 1943 brought about the peak. Now the properties are rather scarce and therefore I think there will be a diminishing amount of sales. But the market is very active and very strong right at the moment.

Q. In other words, in your judgment the activity of the peak of 1943 would continue if there were houses available? A. Very definitely.

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Q. But there has been a falling off because of the stoppage of building construction, would you say that is the reason? A. Well, very definitely, the scarcity of listers and properties for sale.

Q. And have you observed as the result of such shortage the prices which one and two-family houses have been bringing are on the rise? A. They are very definitely.

Cross-examination by Mr. Collier.

Q. Mr. Bode, you say you manage property for other people? A. Yes, sir, I did.

Q. And you have been doing that for a good number of years? A. That's correct.

Q. And the properties that you now have are less than those you had in 1934? A. 1942 I said.

Q. Do you manage as many parcels today as you did in 1934? A. We manage more than we did in 1934.

Q. And did I understand you to say you have about one-quarter less properties to manage than you did in some previous years? A. Yes. When I made that statement I believe it was in answer to under 1942.

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Q. Yes, I mean that. A. You said 1934.

Q. I did not catch the year. I'm trying to get it again. Tell me what year did you manage more property than you did in 1944? A. 1942 we approximately had our peak amount of properties.

Q. That was the peak year? A. That's right.

Q. Your main business is acting as broker in the sale of real estate, is that right? A. Well, it goes beyond that.

Q. I mean mainly? A. Well, we have a very large mortgage department and insurance department and management department.

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Q. Your mortgage department don't place mortgages? A. We act as broker.

Q. You act as broker? A. That is correct.

Q. You put through mortgage loans for your clients? A. That's correct.

Q. Now, when would you say was mortgage money most available, what years, between 1934 and 1943? A. Well, I think it has been very

plentiful from our own experience since 1936. Of course the market is better today for mortgage money, I mean it's more plentiful now than it was in 1936, but I would say from 1936 on it has been a very active mortgage market.

Q. In other words, from 1936 it is a good mortgage market? A. That is correct.

Q. And you could get good mortgages provided you had sufficient security? A. That is true.

Q. That would not apply to 1935, however? A. No.

323 Q. And mortgage money was not available? A. Well, I would not say that. I would not say it was not available. It was available at all times, but it was harder to get in 1935.

Q. And in 1936 it was rather easy to get? A. No, I wouldn't say it was rather easy. It was better over the depression years.

324 Q. In order to get a mortgage placed in 1936, let us say, how could you get it, would it have to be a small percentage of its value, or— A. No, not necessarily a smaller percentage of its value. We always found that if we have a good application, a well located building, and it is in good physical condition, that we have had no trouble to get 60 percent of its appraised value. That's the minimum, however. We could get more than 60 percent on some occasions.

Q. And that was the isolated instance where you could get a mortgage, it would have to be what we call top-notch property and location in 1936?

A. Well, we placed mortgages. For instance, I have to visualize this from the standpoint of Queens County, I'm a Queens County man primarily, and on the North Shore, but we placed mortgages on ordinary four-story walkups in

Astoria, for instance, in 1936. I would not call it top-notch property, but it was good property, well located, well rented.

Q. Well, let me ask you this as an expert: Would you say that where foreclosures of mortgages by banking institutions exceeded the loans placed, the mortgages placed during a certain year by about almost two and a half times, foreclosures in dollars and cents, over the moneys placed on mortgages, would you say that is a healthy condition? A. No.

Q. Unhealthy condition? A. Well, I wouldn't say it's unhealthy. I think you have got to go beyond that. That was at the time when foreclosures were prevalent, the institutions were still cleaning up their accounts, and they could not themselves—you must remember that in 1936 there was very little new construction, it was just beginning, and in 1937 we came in with strong construction, and then was the time when the institutions were able to place money. In 1936 there were very few mortgages available to be gotten, so that the institutions could not lend the money out. They had the money to lend out.

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Q. In other words, you mean to say there were less—very few applications for mortgages? A. That's right.

Q. If, however, they were equal, the amount of foreclosures was almost equivalent to more than the mortgages placed, would that be healthy or an unhealthy condition? A. I don't think we could say either way without going into the facts in a little greater detail, because in trying to answer your question, in 1936 for instance, as I get it—you're talking about 1936—

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Q. I'm now referring to 1937. A. Well, in 1937 the conditions were very much improved, and we were having quite a lot of new construction, large buildings, and there was plenty of mortgage money available.

Q. And you had plenty of reconstruction, is that right? A. Yes.

Q. And plenty of new buildings going up? A. That is true.

329 Q. And if, however, during that year the foreclosures exceeded the moneys placed out on mortgages, that would not reflect a sound condition, would it? A. I can't answer that question either way, because my recollection of 1937 was that as far as real estate was concerned we had a much improved market. Now, I can't say that it did not present a healthy market. In my opinion we were much on the recovery at that time, 1936 and 1937.

Q. Well, you said that 1937 was a good market, mortgages were procurable; a lot of building going on, a lot of new loans were placed, the HOLC was in operation at the time? A. Oh, yes.

Q. Is that right? A. That's right.

Q. And by HOLC, the institution that took money took less of a risk because the mortgages are insured or guaranteed, is that so? A. I don't get that.

330 Q. The HOLC insures or guarantees the payment of these mortgages to the institutions, don't they? A. No, not HOLC. They held their own mortgages.

Q. FHA, is that right? A. Yes.

Q. So the institutions took less of a risk by placing those mortgages than they did before? A. Oh, but the majority of the mortgages were not placed with the FHA.

Q. And those that did, they assumed very little risk? A. That goes without saying, it's a government guarantee.

Q. That's right. So that would create a better market by reason of that FHA? A. Oh, I don't think there is any question but that FHA helped.

Q. You say in 1937 there was plenty of building, plenty of mortgage money available, and a lot of activity, is that right? A. That is correct.

Q. But if true that year the foreclosures in dollars and cents exceeded the moneys placed out on mortgages, would you still say that it was a healthy condition? A. Well, I certainly would not say that it was an unhealthy condition. I tried to explain to you my opinion, that we had not been able to reach the peak, and the institutions had not cleared up their portfolios on the properties, that they could probably have foreclosed years before. I know that the institutions withheld foreclosures for a long time on many properties. But as we got new building, the institutions were then able to put their money out. The mere fact that foreclosures were higher than the loans I do not think reflects the true picture one way or the other, good or bad.

Q. In 1937 the moratorium law was in effect? A. Indeed it was.

Q. A period of approximately four years? A. That's right.

Q. And certain mortgages made prior to 1932 or 1933 could not be foreclosed? A. That's right.

Q. There had to be new mortgages placed subsequent to the passage of the moratorium law in order to foreclose them? A. There were some moratorium mortgages paid off.

Q. I did not ask you about paying off. I said foreclosures. A. Oh, excuse me.

Mr. McGrath: I think this is very misleading.

The Court: Of course if there was default in the taxes they were foreclosable.

Mr. McGrath: That is right.

Mr. Collier: That is true, I will amend it.

335 Mr. McGrath: Now, if your Honor pleases, I have been endeavoring to reach the Assistant Commissioner of the Department of Housing and Buildings of the City of New York, Joseph Platzker, for the purpose of having him authenticate certain figures which appear in a brief submitted by the Mayor of the City of New York to the Office of Price Administration in opposition to the request of property owners in the City of New York for a general 10 percent rise in rents over the ceiling of March 1, 1943, which has been fixed for this area. It would not be necessary to call Mr. Platzker if these figures could be received in evidence taken from this brief as a proper source. Now I realize that there may be some merit to any objection which could be made to that offer by my adversary; but in the absence of a consent to the taking of the figures out of this brief I am afraid I shall have to ask for an opportunity to call Mr. Platzker at a time when I can get him. Now I cannot subpoena him as a public official without an order of the Court, but if I had been able to reach him, or Mr. Heinlein my associate here had been able to reach him yesterday afternoon or this morning, we believe he would have come over voluntarily, but we have not been able to do it. Now, aside from that testimony and the figures which will be introduced through it I can finish this case in probably another half hour, which will consist chiefly of talking by myself. That is all we have left. With your Honor's permission

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I would like to get some expression from Mr. Collier as to how he feels about this.

Mr. Collier: I would like to help the situation along.

The Court: Suppose you finish up everything else and then we will adjourn until tomorrow morning, and perhaps you will not need Mr. Platzker at all.

Mr. McGrath: I want to ask your Honor to take judicial notice of certain matters to which I will now refer very briefly, and which matters will be embodied in proposed findings which we shall submit following the termination of the case, thereby obviating the necessity of introducing this lengthy matter into the record.

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The first matter is the President's message to Congress on inflation.

The Court: These are matters that I understand you wish the Court to take judicial notice of.

Mr. McGrath: Yes, sir. And I take it that under the authorities in our brief your Honor has the right to take judicial notice of a Presidential message to Congress. This is House document No. 834, and I should like to read the points to which the President directed the Congress' attention at that time. He states:

"I reiterate the seven point program which I presented April 27, 1942: (1) To keep the cost of living from spiralling upward we must tax heavily, and in that process keep personal and corporate profits at a reasonable rate. The word 'reasonable' being defined at a low level. (2) To keep the cost of living from spiralling upward we must fix ceilings on the prices which consumers, retailers, wholesalers and manufacturers pay for

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the things they buy, and ceilings on rents for dwellings in all areas affected by war industries.

(3) To keep the cost of living from spiralling upward we must stabilize the remuneration received by individuals for their work. (4) To

keep the cost of living from spiralling upward we must stabilize the prices received by growers for the products of their lands. (5) To keep the

cost of living from spiralling upward we must encourage all citizens to contribute to the cost of winning this war by purchasing war bonds

with their earnings instead of using those earnings to buy articles which are not essential.

(6) To keep the cost of living from spiralling upward we must ration all essential commodities of which there is a scarcity so that they may be distributed fairly among consumers and not merely

in accordance with financial ability to pay high prices for them: (7)" (And this is the one upon which we particularly rely) "To keep the cost of

living from spiralling upward we must discourage credit and instalment buying and encourage the paying off of debts, mortgages and other obligations, for this promotes savings, retards excessive

buying, and adds to the amount available to the creditors for the purchase of war bonds."

Further on in that message the President made the following statement, which I quote:

"Annual wage and salary disbursements have increased from 43.7 billion dollars in 1939 to an estimated \$75,000,000,000 in 1942. This represents an increase of 71 per cent. To obtain the

full appreciation of what that increase means we should remember that \$75,000,000,000 is more than our total national income was during any single

year in the nineteen thirties. Due to the con-

stantly increasing employment overtime the wage rate increases, the annual wage and salary bill for the entire country has been rising by more than \$1,000,000,000 a month."

I also ask the Court to take judicial notice of the Executive Order of the President, No. 8,734, establishing the Office of Price Administration and Civilian Supply in the Executive Office of the President, and defining its functions and duties. I should simply like to read the first part of that order:

"By virtue of the authority vested in me by the constitution and the statutes, and in order to define further the functions and duties of the office of emergency management with respect to the national emergency as declared by the President on September 8, 1939, for the purpose of avoiding profiteering and unwarranted price rises, and of facilitating an adequate supply and the equitable distribution of materials and commodities for civilian use, and finding that the stabilization of prices is in the interest of national defense, and that this order is necessary to increase the efficiency of the defense program, it is hereby ordered—"

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Then further, creating the Office of Price Administration and Civilian Supply, the head of which shall be an administrator appointed by the President, the order directs that the administrator shall:

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"(a) Take all lawful steps necessary or appropriate in order (1) to prevent price spiralling, rising cost of living, profiteering and inflation resulting from market conditions caused by the diversion of large segments of the nation's re-

sources to the defense program by interruptions to the normal sources of supply or by other influences growing out of the emergency.

"(2) To prevent speculative accumulation, withholding and hoarding of materials and commodities.

347 "(3) To stimulate provision of the necessary supply of materials and commodities required for civilian use in such manner as not to conflict with the requirements of the War, Navy and other Departments and Agencies of the Government and of foreign governments for materials, articles and equipment needed for defense (such requirements are hereinafter referred to as 'military defense needs'). And

"(4) After the satisfaction of military defense needs, to provide through the determination of policies and the formulation of plans and programs for the equitable distribution of the residuary supply of such materials and commodities among competing civilian demands."

348 Just in passing we might observe that the emergency which is referred to in these documents from which I read is quite a different emergency than the one which is referred to in the legislation originally enacted in 1933.

I ask your Honor to take judicial notice of the report of the House Committee on Banking and Currency, No. 1409, November 7, 1941, which deals with the Emergency Price Control Act of 1942. And I quote the following paragraph from that report:

"In view of the sharp increase in purchasing power resulting from defense expenditures, combined with increasing acute shortages of certain

essential materials, legislation to deal with the inflationary tendencies caused by this condition is essential for the protection of the national defense and security. Unless such legislation is enacted, inflationary increases in prices are inevitable, and if not prevented will lead to future deflation and depression, with all the human misery and economic chaos resulting therefrom, will retard the defense program, and will aggravate the dangers and difficulties of a return to a normal peacetime basis."

I ask your Honor to take judicial notice of the Home Owners Loan Corporation Act of 1933 and of the activities of the Home Owners Loan Corporation pursuant to that Act. And I respectfully refer your Honor to the United States Government Manual for the winter of 1943-44 for a summary of the activities and the reasonable current position of the Home Owners Loan Corporation. I would like to read the following from that Manual:

"Home Owners Loan Corporation. Creating and Purpose. The Home Owners Loan Corporation was established by the Home Owners Loan Act of 1933, as amended. Its purpose was to grant long term mortgage loans at low interest rates to distressed home owners who were unable to procure financing through normal channels, and to help stabilize real estate and mortgage values—then almost non-existent because of the depression. As provided by the Act, the corporation ceased its lending activities in 1936. Since then it has been engaged in liquidating its loans and other assets.

"Organization. Collections of its loans and rental and sale of the corporations' acquired

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properties are carried on through eight regional offices under the corporation's home office in New York."

I am skipping a portion and coming down to the paragraph "Liquidation of Assets."

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"Liquidation of Assets. Since 1936 the corporation's chief task has been to aid its borrowers in meeting their payments and keeping their homes and to liquidate its loans and properties. On June 30, 1943, it was collecting on nearly 737,000 accounts, 597,000 those of original borrowers and the rest purchasers of foreclosed property, about 243,000 borrowers and purchasers of HOLC houses had paid off their accounts in full. More than 110,000 borrowers were making monthly payments in amounts greater than called for by their contracts. Of the 195,600 properties which the corporation had taken over, 171,000 or 87 per cent had been sold."

"Up to June 30, 1943, total loans, subsequent advances, and other investments of the corporation in its loans, sales, contracts and properties, reached a cumulative total of \$3,484,000,000. On the same day \$1,852,000,000, or 53.1 per cent of this amount, had been liquidated."

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The Court: Is there any segregation of the figures as they apply to New York State?

Mr. McGrath: No, sir. I do not have any such segregation. It is an interesting thing to observe, though, that of all the Home Owners Loan activities they have succeeded in liquidating out 53.1 per cent. I have here a report of the Home Owners Loan Corporation which was made by John H. Fahey, Federal Home Loan Bank Commissioner, to Congress on January 31, 1944,

which contains some extremely illuminating information on the activities of the Home Owners Loan Corporation. This is in the main an argument urging Congress not to precipitately liquidate the Home Owners Loan Corporation but to let it liquidate in an orderly manner over a period of years, thereby realizing very much more than they could if they embarked on a course of immediate sacrificing of its assets. There are attached to this report various exhibits.

I would like to ask your Honor to take judicial notice of this report of the Home Owners Loan Corporation which was made by the Commissioner of the Federal Home Loan Bank Administration to the 78th Congress, Second Session, House Document No. 448, and for the convenience of the Court I would be glad to leave it with you at this time.

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I also wish to direct your Honor's attention to the organization of the Federal Housing Administration, which is dealt with in the United States Government Manual for the winter of 1943-44. I would simply like to read a short portion of the chapter dealing with the Federal Housing Administration:

"Creation and Authority. In accordance with Executive Order 9070 of February 24, 1942, the Federal Housing Administration under the National Housing Agency exercises functions formerly vested in the Federal Housing Administration under the Federal Loan Agency. Its function continues to be that of insuring private lending institutions against loss on mortgage loans secured by one to four-family dwellings or by large-scale rental housing projects, and on loans for property repair or improvement. The Federal

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Housing Administration was created by the National Housing Act, approved June 27, 1934.

"Purposes. The National Housing Act as amended authorizes the Federal Housing Commissioner to insure lending institutions against losses incurred on two general types of loans, those for the repair, alteration or improvement of real property, which may or may not be secured by collateral security, and those secured by mortgages on structures designed primarily for residential use."

359 In our findings we may request the Court to find in greater detail the nature and extent of the activities of the Federal Housing Administration. I do not think it is necessary to embody that in the record at the present time.

In addition to those already mentioned, we expect to ask the Court to take judicial notice of the various governmental documents, proclamations, enactments, resolutions, and directives which naturally fall into two groups. Group 1 would be those dealing with the depression and the original so-called emergency, and among these we list the Presidential proclamation declaring a banking holiday and the proclamation of Governor Lehman following that of the President, the creation of the Home Owners Loan Corporation to which reference has already been made, the 360 preamble of the original moratorium law, the creation of the WPA, NRA, CCC, the National Housing Act, and the Federal Deposit Insurance Corporation.

The other group naturally relating to the issue of the termination of the so-called emergency and the advent of entirely new conditions would embrace the judicial notice by the Court of the fol-

lowing matters, among others: Declaration of War in Europe September 1, 1939; Declaration of War on the United States December 8, 1941; War Man Power Commission; the creation and the order freezing wages, the creation of the office of Economic Stabilization, the creation of the Office of Price Administration with its branch or subdivision embracing emergency rent control; the figures of the Labor Department on employment and payrolls, the various President's messages to Congress and to the people with relation to holding the line against inflation, the discontinuance of WPA, the achievements of the Home Owners Loan Corporation, and the Federal Housing Administration.

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We also ask the Court to take judicial notice of the state of the law in other states with regard to moratorium. And I might say for the Court's convenience on that that I have telegrams from all the states that did have a moratorium in effect within the last year or two, from either the Governor or the Secretary of State, saying we no longer have a moratorium. I can make those available if there is any question in your Honor's mind about it. I do know as an absolute fact that there is no more moratorium in any other state except New York at the present time.

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That, with the exception of the data contained in the Mayor's brief and the calling of Mr. Platzker, will be the plaintiff's case.

The Court: You have not been able to determine yet whether you want to ask Mr. Platzker anything on cross-examination?

Mr. Collier: I have not gone through this, although I think we can dispense with that. We

will let that go for what your Honor thinks it is worth.. Your Honor will take judicial notice of various things to give this just the same weight as everything else.

The Court: All right.

Mr. McGrath: If that is the case then I want to read into the record from that brief the various matters.

The Court: Are you having it marked as an exhibit?

365 Mr. McGrath: I am about to indicate to you my problem in that regard. I have a brief here which was loaned to me by the attorneys in New York who are opposed to the Mayor of the City of New York in seeking a general 10 per cent rise in rents above the fixed ceiling. I am obliged to return this brief. I am informed by the Mayor's office, by the office of Mr. Platzker in the Department of Housing and Buildings that they do not have another copy of this brief available over there, and therefore ask your Honor's permission to offer now the various sets of figures, identifying them by the page number of this brief, and then I would like the opportunity to photostat those figures which are received in evidence as so identified and furnish a copy to the Court and furnish a copy to my adversary, marking the photostats with the exhibit numbers that the Court will indicate. If that is agreeable.

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The Court: Suppose we consider this as marked Plaintiff's Exhibit 12.

Mr. McGrath: There are various portions of it that I want marked. I cannot mark the whole brief.

I offer now the vacancy survey of competitive apartments in Manhattan, which appears on page

9 of the Mayor's supplemental memorandum to the Office of Price Administration in the 315 West 97th Street Realty Co. case, which vacancy survey embraces three classes of properties, apartment houses nine stories and over, six-story elevator apartments, and walk-up apartments.

I offer also the survey of vacancies in old-law tenements made by housing inspectors of the Department of Housing and Buildings of the City of New York as of April 1, 1944, which appears on page 12 of said brief.

The Court: The first one that you offered then I suppose, when the photostat is presented, will be deemed to be marked Plaintiff's Exhibit 12, and the second one Plaintiff's Exhibit 13.

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(Received and considered as having been marked Plaintiff's Exhibits 12 and 13.)

Mr. McGrath: I offer in evidence the table appearing at page 37 of the said brief showing the real estate tax levies in New York City for the years 1924 to 1943 inclusive, and showing the percentage of taxes uncollected at the end of each year, the source of these figures being the Department of Finance of the City of New York.

(Received and considered as having been marked Plaintiff's Exhibit 14.)

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Mr. McGrath: I offer in evidence vacancy survey of competitive apartments in Manhattan, not including old-law tenements, from 1924 to 1944, which appears at page 24 of the said brief.

(Received and considered as having been marked Plaintiff's Exhibit 15.)

Mr. McGrath: I offer in evidence the listing of one hundred instances of Manhattan foreclosures during 1943, where amounts due on mortgages exceed the assessed value. These figures appear on pages 28 and 29 of the said brief.

(Received and considered as having been marked Plaintiff's Exhibit 16.)

371 Mr. McGrath: I offer in evidence the table of figures showing one hundred instances of deeds on Manhattan property surrendered in lieu of foreclosure in 1943, where the amount due on mortgages exceeds the assessed value. This table appears at pages 30 and 31 of the said brief.

(Received and considered as having been marked Plaintiff's Exhibit 17.)

Mr. McGrath: I offer in evidence the table appearing at page 36 of the brief, which shows the basic real estate tax rate for the City of New York for the years beginning 1939-40 down to the probable figure for the year 1944-45, which figures come from the Chief Assessor's Office of the Tax Department of the City.

372 (Received and considered as having been marked Plaintiff's Exhibit 18.)

Mr. McGrath: I offer in evidence Appendix L at page 39 of the said brief, which deals with forty-seven mortgages refinanced in 1943 at 7 per cent increase in principal.

(Received and considered as having been marked Plaintiff's Exhibit 19.)

Mr. McGrath: Plaintiff rests, your Honor.

Mr. Coller: The defendant moves to dismiss the complaint on the ground that the plaintiff has failed to establish a cause of action.

The Court: I shall reserve decision on the motion.

Mr. Coller: The defendant rests, and renews the motion.

The Court: I reserve decision on the motion. Do you wish to submit any brief?

Mr. Coller: Yes, sir.

The Court: Submit by June 6th.

CASE CLOSED.

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Plaintiff's Exhibit 1.

(Documentary Stamps)

KNOW ALL MEN BY THESE PRESENTS, THAT CHRISTIAN M. ANDERSON and BERTHA ANDERSON, his wife, residing in the Borough of Brooklyn, City and State of New York, hereinafter designated as the obligors do hereby acknowledge themselves to be justly indebted to

THE EAST NEW YORK SAVINGS BANK

a domestic banking corporation of Brooklyn, New York, hereinafter designated as the obligee, in the sum of FIVE THOUSAND (\$5,000.) Dollars, lawful money of the United States, which sum said obligors do hereby jointly and severally covenant to pay the said obligee, its successors or assigns on the first day of April, nineteen hundred twenty-four together with interest thereon to be com-

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Plaintiff's Exhibit 1.

puted from the day of the date hereof at the rate of five and one-half per centum per annum and to be paid semi-annually on the first days of April and October in each year to the treasurer of said bank at its banking rooms during its business hours until said principal sum shall be fully paid.

377 IT IS HEREBY EXPRESSLY AGREED, that the said principal sum shall become due at the option of the said obligee, successors or assigns, after default in the payment of interest for twenty days, or after default in the payment of any taxes, assessments or water rates for thirty days after the same becomes due and payable, or after default in the payment of any instalment of principal, or after any other default, or upon the happening of any event by which, in any case, under the terms of the mortgage securing this bond, the said principal sum may or shall become due and payable; also that all of the covenants and agreements made by the said obligor in said mortgage are hereby made part of this instrument.

Signed and sealed this 19th day of July, nineteen hundred and twenty-one.

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CHRISTIAN M. ANDERSEN [L. S.]
BERTHA ANDERSEN [L. S.]

IN THE PRESENCE OF

G. FRED MIDDENDORF, JR.

STATE AND CITY OF NEW YORK }
COUNTY OF KINGS } ss.:

On this 19th day of July, nineteen hundred and twenty-one, before me came CHRISTIAN M. ANDERSON and BERTHA ANDERSON, his wife, to me known to be the individuals described in, and who executed the within instrument, and severally acknowledged that they executed the same.

A. C. FARRELL

Notary Public, Kings County No. 164

Certificate filed in Queens County No. 2191

Kings County Register's No. 2185

Commission Expires March 30, 1922

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No. 2540

App. No. 1519

CHRISTIAN M. ANDERSON

and

BERTHA ANDERSON,

his wife,

Address #2611 Atlantic Avenue,
Brooklyn, N. Y.

TO

THE EAST NEW YORK SAVINGS BANK

BOND

381

Amount, \$5,000.

Interest rate, $5\frac{1}{2}\%$.

Dated, July 19th, 1921.

Principal due, April 1st, 1924.

Interest payable, Apr. & Oct. 1st

THE EAST NEW YORK SAVINGS BANK

Pennsylvania and Atlantic Aves.

Brooklyn-New York

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Plaintiff's Exhibit 2.

THIS MORTGAGE made the 19th day of July, nineteen hundred twenty-one between CHRISTIAN M. ANDERSEN and BERTHA ANDERSEN, his wife, residing at #2611 Atlantic Avenue, Borough of Brooklyn, City and State of New York, the mortgagors, and

THE EAST NEW YORK SAVINGS BANK

a domestic banking corporation of No. 2644 Atlantic Avenue, Brooklyn, New York, the mortgagee,

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WITNESSETH, that to secure the payment of an indebtedness in the sum of FIVE THOUSAND (\$5,000.) dollars, lawful money of the United States, to be paid on the first day of April, nineteen hundred twenty-four together with interest thereon to be computed from the day of the date hereof at the rate of five and one-half per centum per annum and to be paid semi-annually on the first days of April and October in each year to the treasurer of said bank at its banking rooms during its business hours until said principal sum shall be fully paid according to a certain bond or obligation bearing even date herewith, the mortgagor hereby mortgages to the mortgagee ALL

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that certain lot, piece or parcel of land with the buildings and improvements thereon erected, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York, bounded and described as follows:

BEGINNING at a point on the northerly side of Atlantic Avenue distant twenty-five (25) feet two and one-half ($21\frac{1}{2}$) inches westerly from the cor-

ner formed by the intersection of the northerly side of Atlantic Avenue with the westerly side of Sheffield Avenue; thence westerly along the northerly side of Atlantic Avenue twenty-five (25) feet more or less to a point opposite the center of a party wall standing partly on premises herein described and partly on premises next adjoining on the west; thence northerly parallel with Sheffield Avenue part of the distance through the center of a party wall one hundred fourteen (114) feet five (5) inches more or less to the southerly side of lot 23, block 22 on a map of East New York Lands belonging to John R. Pitkin, The East New York Land Company and others, and filed in the Kings County Register's Office; thence easterly along the southerly side of lot 23 as laid down on said map twenty-five (25) feet more or less to a point on a line drawn parallel with Sheffield Avenue from the point of beginning; thence southerly parallel with Sheffield Avenue part of the distance through a party wall one hundred seventeen (117) feet eight (8) inches more or less to the point or place of BEGINNING.

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TOGETHER with all the right, title and interest of the mortgagors, of, in and to the land lying in said Atlantic Avenue in front of and adjoining the above described premises to the center line of said avenue.

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Being the same premises this day conveyed to the mortgagors by Erwin F. Gross as executor under the Last Will and Testament of Anna Phister, deceased, Richard Phister, and by Jacob Zahner as special guardian pursuant to an order of Supreme Court Kings County entered July

11th, 1921, and Jacob Zahner, individually, by deed bearing dates July 11, 1921 and July 19/1921 respectively, delivered and intended to be recorded simultaneously herewith, this mortgage being given to secure the payment of the sum of Five Thousand (\$5,000.) Dollars advanced by the mortgagee to the mortgagors, and which sum was used by the mortgagors in payment of part of the purchase price or consideration for said conveyance.

TOGETHER with all fixtures and articles of personal property now or hereafter attached to, or used in connection with, the premises, all of which are represented to be owned by the mortgagor and are covered by this mortgage.

And the mortgagor covenants with the mortgagee as follows:

1. That the mortgagor will pay the indebtedness as hereinbefore provided.

2. That the mortgagor will keep the buildings on the said premises insured against loss by fire for the benefit of the mortgagee.

3. That no building on the premises shall be removed or demolished without the consent of the mortgagee.

4. That the whole of said principal sum shall become due after default in the payment of any installment of principal or of interest for twenty days, or after default in the payment of any tax, water rate or assessment for thirty days, after the same becomes due and payable.

5. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.

6. That the mortgagor will pay all taxes, assessments or water rates, and in default thereof, the mortgagee may pay the same.

7. That the mortgagor within six days upon request in person or within thirty days upon request by mail will furnish a statement of the amount due on this mortgage.

8. That notice and demand or request may be made in writing and may be served in person or by mail.

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9. That the mortgagor warrants the title to the premises.

10. That in case of a sale, said premises, or so much thereof as may be affected by this mortgage, may be sold in one parcel.

11. That the whole of the principal sum shall become due at the option of the mortgagee after default for thirty days after notice and demand in the payment of any installment of any assessment for local improvements heretofore or hereafter laid which is or may become payable in annual installments, and which has affected, now affects or hereafter may effect the said premises, notwithstanding that such installments be not due and payable at the time of such notice and demand; and also that the whole of said principal sum shall immediately become due at the option

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of the mortgagee upon any default in keeping the buildings on the premises insured against loss by fire as required by paragraph numbered "2" above, or immediately upon the actual or threatened demolition or removal of any building erected or to be erected upon said premises, or if after application by any holder of this mortgage to two or more fire insurance companies lawfully doing business in the State of New York and issuing policies of fire insurance upon buildings situate in the place where the mortgaged premises are situate, the companies to which such application has been made shall refuse to issue such policies.

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12. That the whole of said principal sum shall become due at the option of the mortgagee, if the buildings on said premises are not maintained in reasonably good repair or upon the failure of any owner of said premises to comply with the requirement of any department of the State or City of New York, within three months after an order making such requirement has been issued by any said State or City Department.

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13. In the event of the passage after the date of this mortgage of any law of the State of New York, deducting from the value of land for the purposes of taxation any lien thereon, or changing in any way the laws for the taxation of mortgages or debts secured by mortgage for State or local purposes, or the manner of the collection of any such taxes, so as to affect this mortgage, the holder of this mortgage and of the debt which it secures, shall have the right to give thirty days' written notice to the owner of the land requiring the payment of the mortgage debt. If such notice

Plaintiff's Exhibit 2.

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be given, the said debt shall become due, payable and collectible at the expiration of said thirty days.

14. That the holder of this mortgage in any action to foreclose it, shall be entitled (without notice and without regard to the adequacy of any security for the debt) to the appointment of a receiver of the rents and profits of said premises; and in the event of any default in paying said principal or interest, such rents and profits are hereby assigned to the holder of this mortgage as further security for the payment of said indebtedness.

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IN WITNESS WHEREOF, this mortgage has been duly executed by the mortgagor.

CHRISTIAN M. ANDERSEN [L. S.]
BERTHA ANDERSEN [L. S.]

IN THE PRESENCE OF
G. FRED MIDDENDORF, JR.

STATE AND CITY OF NEW YORK }
COUNTY OF KINGS } ss.:

On this 19th day of July, 1921, before me came CHRISTIAN M. ANDERSEN and BERTHA ANDERSEN, his wife, to me known and known to me to be the individuals described in, and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

399

A. C. FARRELL
Notary Public, Kings County No. 164
Certificate filed in Queens County No. 2191
Kings County Register's No. 2185
Commission Expires March 30, 1922

400

Plaintiff's Exhibit 2.

Record ✓

Jul 21 1921 10 48 AM

No. 2540

App. No. 1519

59172

CHRISTIAN M. ANDERSEN

and

BERTHA ANDERSEN,

his wife,

TO

THE EAST NEW YORK SAVINGS BANK

401

Record at same time as both deeds

MORTGAGE

Dated July 19th, 1921.

Amount \$5,000. Rate 5½%

Principal Due April 1st, 1924.

Interest Payable Apr. & Oct. 1st.

The land affected by the within instrument lies
in Section 12 in Block 3668 on the Land Map of
the County of Kings.

Record and Return to

THE EAST NEW YORK SAVINGS BANK

Pennsylvania and Atlantic Aves.

402

Brooklyn-New York

RESERVE THIS SPACE FOR USE OF
RECORDING OFFICE

Q 2555

Kings County Register's Office

Received as Recording Tax on
the Within Instrument \$25.00

Jul 21 1921

EDWARD H. MADDOX

M.

Register Kings County

Plaintiff's Exhibit 3.

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Recorded in Register's Office, Kings County, in
Liber 4971 Page 31 Block 3668 of Mortgages at
48 minutes Past 10 AM.

Jul 21 1921

Witness my hand and official seal.

EDWARD H. MADDOX,

Register

JOHN FEITNER,

Deputy Register

25.00—4.00

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Plaintiff's Exhibit 3.

(Reprinted from New York Times of May 22,
1944, page 21.)

CITY SETS A RECORD IN TAX COLLECTIONS

91.1% of Current Levy Had Been Paid In on
April 30, the Mayor Announces

SEES PROPERTY VALUES UP

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Views Outlook for After War as 'Simply Great'—
Names D-Day Prayer Committee

The city has just broken all records for real
estate tax collections, with 91.1 per cent of the
current levy paid into its treasury by April 30,

Mayor La Guardia declared yesterday in his weekly radio broadcast from City Hall.

Authority for the Mayor's statement was a memorandum report sent by City Collector William Reid to City Treasurer Almerindo Portfolio. The report predicted that 94 or 95 per cent of the current levy of \$489,499,802 would be collected by June 30.

407 The faster tempo of collections, Mr. Reid reported, was not confined to real estate taxes, but also applied to other city imposts, such as water rents and sales taxes. He ascribed the inrush of tax moneys to improved employment conditions and "tremendous increases" in business.

"Continued improvements in employment, with a consequent demand for bigger and better apartments, increases in earnings of families as well as in the number of those in the family working, and tremendous increases in business have all had their effect in improving tax conditions," the report said.

408 According to the report, \$445,954,477 of the current levy was paid up by April 30, as compared with \$432,846,560, or 89.44 per cent of the 1942-43 levy, paid in the comparable period last year. The current levy is \$5,559,486 more than last year's, but collections this year have exceeded those of last year by \$13,107,917.

Mr. Reid's report showed that 94.79 per cent of the first half of the levy was paid by April 30, as compared with 93.78 per cent in the same period last year. The percentage collected this year on account of the second half of the levy is 87.41, against 85.1 a year ago.

COLLECTIONS BY BOROUGHES

Borough collections, the report declared, have also broken all previous records. In Manhattan the collections on account of both halves amounted to 94.8 per cent of the levy, compared with 93.34 per cent last year. In the other boroughs the comparative collections were as follows: Bronx, 89.78 per cent, against 88.41 last year; Brooklyn, 88.27 per cent, against 86.36; Queens, 87.03 per cent, against 84.83; Richmond, 76.53 per cent, against 74.47. The largest increase was that in Queens, 2.2 per cent.

The increased tax collections, the Mayor declared in his broadcast, gave further proof that property values in New York were rising. The outlook for the post-war period, he said, was "simply great", despite gloomy predictions by a handful of pessimists.

In April, he noted, the city gained twenty-four new business concerns and only one moved away. As for real estate values, the Mayor declared, sixty-three parcels of property in the Bedford-Stuyvesant section of Brooklyn, assessed at \$322,000, had been valued by the courts at \$425,000 in condemnation proceedings involving a city school and playground project. The owners, the Mayor said, had asked for a total of \$587,000.

The Mayor announced the appointment of a committee consisting of Grover A. Whalen, director of the CDVO; former Magistrate Edward C. Maguire; James S. Quinn, representing the American Federation of Labor, and Saul Mills, representing the Congress of Industrial Organizations, to aid him in conducting informal prayer services throughout the city when D-day comes. A feature

of these exercises, the Mayor said, would be an open-air prayer service the day after D-day on the east side of Madison Square Park.

The Mayor suggested that employees in shops and stores halt routine activities for a moment of prayer if news of the invasion comes during working hours. If it comes at night, he suggested that all citizens stop in at some church for a moment of prayer on their way to work or business. These prayers are all the more warranted, he said, because New York City alone has more men and women in the armed forces than any State except Pennsylvania.

Appealing to New Yorkers to spend their vacations working on up-State farms, the Mayor declared that city employees, who otherwise have been forbidden to do outside work, would be encouraged to perform this useful wartime labor during their vacations.

The Mayor's broadcast closed with an appeal to citizens to co-operate in the elimination of unnecessary noise this summer. All licensed places, he said, must co-operate in stopping all "raucous outbursts," including the singing of "Sweet Adeline."

Plaintiff's Exhibit 4.

GROUP FIVE MORTGAGE INFORMATION BUREAU

COMPARISON OF TOTAL ASSETS BROOKLYN SAVINGS BANKS

JANUARY 1, 1944 AND JANUARY 1, 1936

	January 1, 1944	January 1, 1936
Total assets	\$1,721,462,004	\$1,310,177,964
65% of total assets amount to	1,118,950,303	851,615,630
B/M account plus other real estate held	664,496,444	744,138,482
% of above to total assets	38.6%	56.8%
Funds available for in- vestment	454,453,859	107,477,148

416

ASSET COMPOSITION OF ALL GROUP FIVE SAVINGS BANKS AS OF JANUARY 1, 1944

	January 1, 1944
Total assets	\$2,038,264,000
First mortgages	770,162,020
Other real estate held	12,678,359
Total of first mortgage and other real estate held	782,840,388
% of above to total assets	38.4%
65% of total assets	1,324,871,615
Balance available for investment	542,031,257

417

Plaintiff's Exhibit 5.

TOTAL REAL ESTATE HELD BY
GROUP V MORTGAGE INFORMATION BUREAU MEMBERS
AS OF JANUARY 1, 1944

	One-Family		Two-Family		3/s-Family		Apartments		Stores & Apts.		Bus. Prop. & Spec.		Vacant Land		Totals	
	No.	Mortgage	No.	Mortgage	No.	Mortgage	No.	Mortgage	No.	Mortgage	No.	Mortgage	No.	Mortgage	No.	Mortgage
Brooklyn:	120	\$ 668,107	147	\$ 750,189	218	\$1,347,952	32	\$ 949,879	640	\$5,660,956	107	\$6,659,167	110	\$1,069,430	1,374	\$17,105,680
Queens:	119	\$ 742,388	35	\$ 198,063	9	\$ 55,017	—	—	175	\$1,445,526	50	\$ 846,053	41	\$ 563,684	429	\$ 3,857,742
Nassau:	32	\$ 303,266	2	\$ 11,000	—	—	1	\$ 56,700	4	\$ 77,874	—	—	6	\$ 47,112	45	\$ 495,952

Plaintiff's Exhibit 6.

COMPARISON OF SALES, FORECLOSURES, AND NEW LOANS OF MEMBER BANKS FROM 1934 THROUGH 1943

TOGETHER WITH COMPARISON OF O. R. E. STILL HELD FROM 1939 THROUGH 1943

O. R. E. Held		Foreclosures		Sales		New Loans	
No.	Amount	No.	Amount	No.	Amount*	No.	Amount
BROOKLYN							
1934		499	\$ 6,372,518	113	\$ 1,674,310	150	\$ 931,800
1935		2,027	20,709,545	592	7,019,870	775	4,923,910
1936		2,107	18,756,877	936	12,696,380	845	7,573,175
1937		1,341	13,508,722	1,179	12,843,814	1,089	12,702,470
1938	4,796	1,013	9,776,764	1,417	14,374,186	1,418	11,152,305
1939	4,294	936	7,790,844	1,764	14,187,534	2,503	29,963,348
1940	3,716	1,002	7,753,028	1,607	13,048,615	2,076	28,456,370
1941	2,759	941	7,242,692	1,893	13,870,928	2,444	24,503,514
1942		809	6,896,055	1,321	9,683,067	882	8,521,438
1943	1,374	818*	7,282,513	1,433	10,160,331	916	16,189,752

* Excluding 180 Clinton Street (\$630,500)

QUEENS							
1934		120	\$ 993,127	25	\$ 156,307	80	\$ 273,100
1935		748	5,317,127	126	1,005,585	413	1,751,840
1936		804	5,273,930	339	3,185,350	575	3,725,000
1937		423	2,338,700	517	4,220,485	1,166	9,328,163
1938	1,476	295	2,330,559	497	3,329,094	1,953	16,007,168
1939	1,274	241	1,706,706	469	2,868,520	5,564	41,613,839
1940	1,147	329	2,016,340	457	2,752,571	6,051	40,160,533
1941	874	334	2,319,177	615	3,449,233	6,616	46,195,807
1942		231	2,085,691	456	3,174,046	2,237	13,628,136
1943	429	266	1,894,720	500	3,028,580	970	9,316,325

NASSAU							
1938		84	\$ 573,739	44	\$ 279,555	813	\$ 4,932,440
1939	228	65	1,017,706	60	402,990	2,653	13,750,273
1940	242	81	594,013	79	731,639	4,072	21,299,424
1941	192	70	559,175	135	919,889	4,069	20,684,022
1942		42	318,335	109	654,255	2,482	11,729,750
1943	45	23	177,079	90	1,022,550	1,107	5,246,696

421

Plaintiff's Exhibit 7.**COMPARISON OF MORTGAGES IN ARREARS
FOR MEMBER SAVINGS BANKS****OCTOBER, 1935, TO OCTOBER, 1943**

	Mortgages in Arrears		Mortgages Under Foreclosure or Assignment of Rents
	Number	Dollar Amt.	
October, 1935	19%	25%	5%
April, 1936	15%	22%	4%
October, 1936	11.7%	17.3%	3%
April, 1937	9.4%	13%	1.6%
October, 1937	8.4%	11%	1.5%
April, 1938	6.6%	8.8%	1.3%
October, 1938	6.3%	8.0%	1.1%
April, 1939	5.5%	7.1%	1.0%
October, 1939	5.6%	6.5%	1.0%
April, 1940	4.9%	6.2%	.9%
October, 1940	5.0%	5.7%	1%
April, 1941	4.3%	5.0%	.9%
October, 1941	3.8%	4.65%	.9%
April, 1942	2.9%	3.6%	.8%
October, 1942	3.0%	3.7%	.8%
April, 1943	2.7%	4.0%	.8%
October, 1943	2.2%	3.0%	.8%

425

Plaintiff's Exhibit 8.**GROUP FIVE MORTGAGE INFORMATION BUREAU****SIX-STORY APARTMENT HOUSES
CONSTRUCTED SINCE 1934 IN BROOKLYN**

426

	Total Units	Vacancy	% Of Vacancy
October 1938	15,844	1,081	7%
1939	19,435	1,149	6%
1940	24,866	1,989	8%
1941	28,616	1,028	4%
1942	30,255	208	.69%
1943	30,255	20	.07%

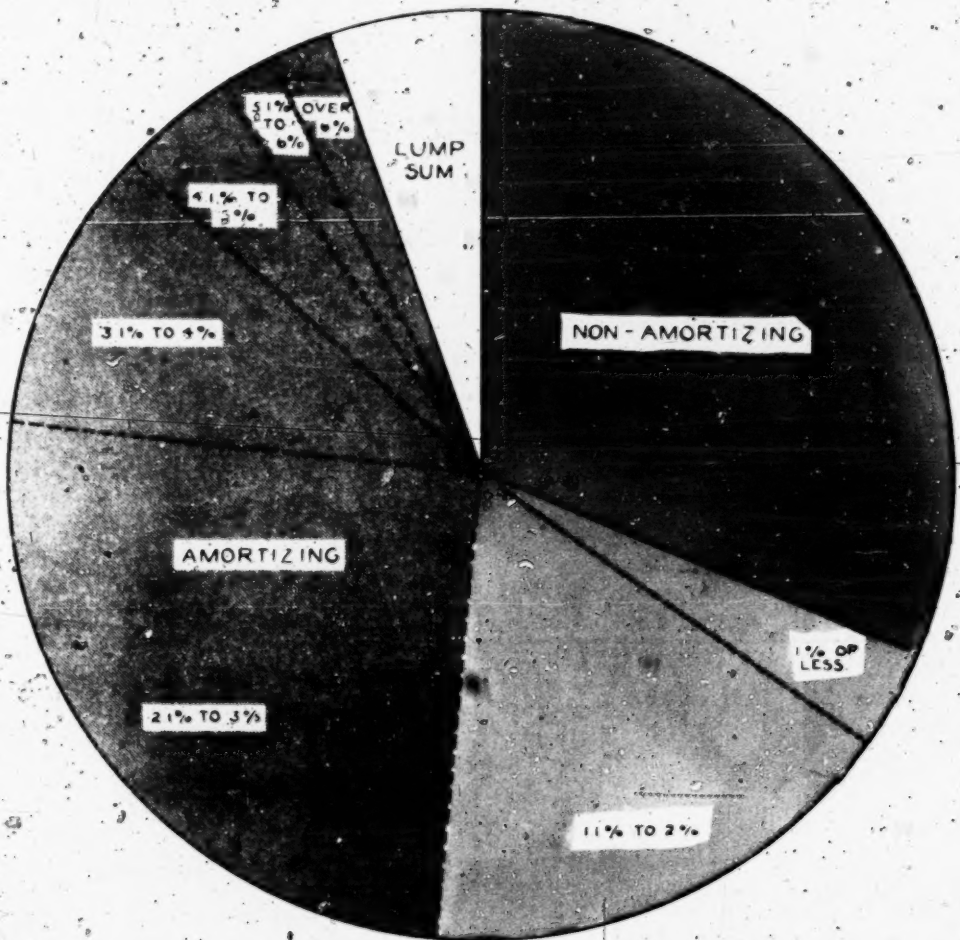
Plaintiff's Exhibit 9.

(Bound in opposite)

PLAINTIFF'S EXHIBIT 9.

CHART D

BROOKLYN MORTGAGES NOW HELD
MADE PRIOR TO 1935



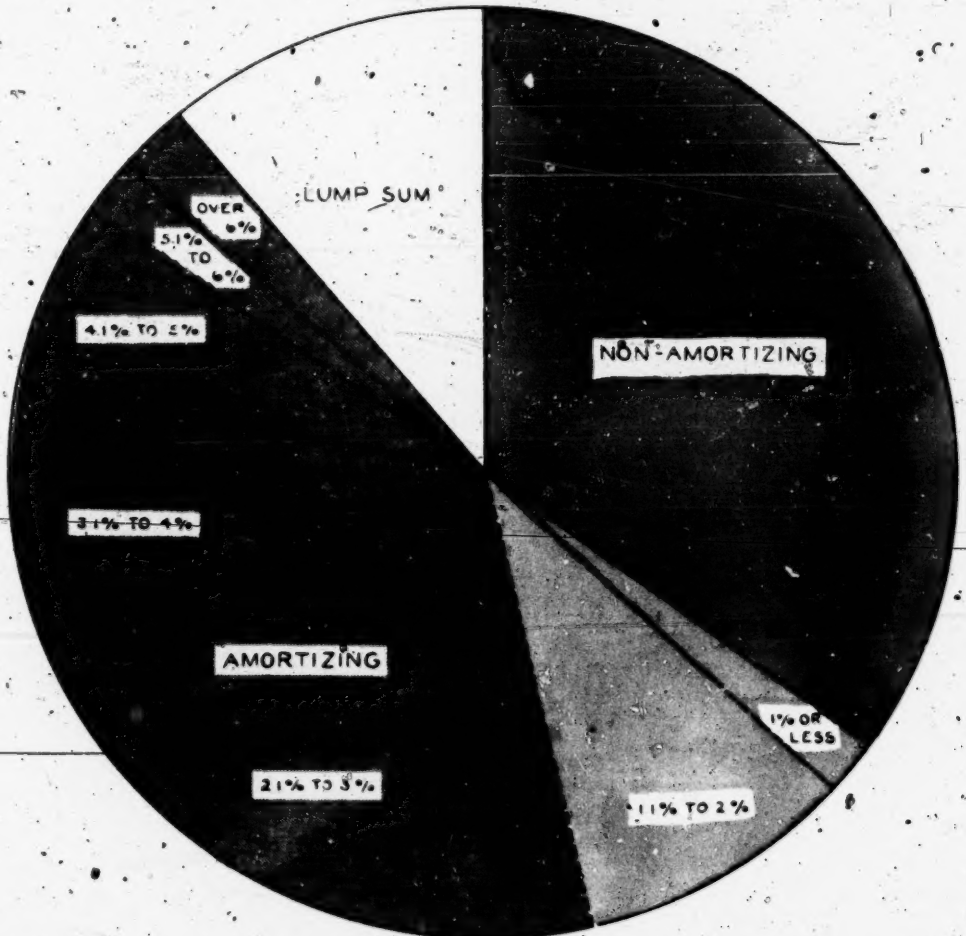
Plaintiff's Exhibit 10.

(Bound in opposite)

PLAINTIFF'S EXHIBIT 10.

CHART E

QUEENS MORTGAGES NOW HELD
MADE PRIOR TO 1935





Plaintiff's Exhibit 11.

(Bound in opposite).

SCHEDULE 3

SCHEDULE 2

TOTAL MORTGAGE PORTFOLIO

LOANS MADE PRIOR TO 1935

BROOKLYN AND QUEENS

APPRAISAL

	50% or less		51% to 66-2/3%		67% to 80%		81% to 100%		Over 100%		TOTAL	
	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount
BROOKLYN												
Non-Amortizing	2,288	7,932,836	5,028	26,017,678	5,312	44,637,898	1,777	15,026,844	1,616	10,784,176	17,018	110,399,430
%		2.25		7.45		12.75		4.35		4.85		31.85
Lump-Sum	1,524	4,437,620	1,129	5,519,020	936	6,269,820	147	894,680	135	1,194,757	3,871	18,315,906
%		0.25		1.05		1.35		0.35		0.35		5.25
Amortizing	3,957	16,315,421	8,188	54,311,510	10,365	101,323,997	2,820	31,681,161	1,404	20,170,639	26,454	223,763,028
%		4.65		15.45		23.35		9.05		5.75		63.55
(Total Int. & Amt. less than 7%)	(183)	(2,309,580)	(1,078)	(14,256,725)	(3,546)	(44,335,098)	(728)	(17,991,060)	(678)	(12,383,561)	(5,223)	(91,326,024)
%		0.75		4.05		12.65		5.15		3.55		25.95
GRAND TOTAL	7,764	28,585,876	14,345	85,848,508	17,613	152,291,719	4,844	47,602,685	3,157	22,149,572	47,823	352,478,360
%		8.15		24.45		43.25		13.55		10.85		100.05
QUEENS												
Non-Amortizing	1,735	5,316,149	6,069	25,806,318	4,229	22,485,224	575	4,418,105	233	1,678,492	12,841	57,704,288
%		3.25		14.65		13.85		2.75		1.05		34.95
Lump-Sum	2,227	5,478,374	1,725	7,128,998	610	4,495,917	73	694,368	16	500,815	4,651	18,298,472
%		3.35		4.35		2.75		0.45		0.35		11.15
Amortizing	3,286	10,776,120	7,308	32,914,640	5,186	39,992,182	395	2,609,067	154	2,142,609	16,328	89,435,018
%		6.55		20.05		24.25		2.25		1.35		54.15
(Total Int. & Amt. less than 7%)	(69)	(560,618)	(326)	(4,091,400)	(668)	(14,426,368)	(72)	(1,318,640)	(36)	(1,325,370)	(1,221)	(22,322,396)
%		0.35		1.35		8.75		1.15		0.85		13.45
GRAND TOTAL	7,248	21,570,643	15,102	65,849,556	10,024	66,973,323	1,043	8,721,540	403	4,322,916	33,820	165,437,778
%		13.05		28.05		40.55		5.25		2.65		100.05

PLAINTIFF'S EXHIBIT 11.

442

Plaintiff's Exhibit 12.**VACANCY SURVEY OF COMPETITIVE
APARTMENTS IN MANHATTAN**(CONDUCTED BY THE MANAGEMENT DIVISION,
N. Y. REAL ESTATE BOARD)**(1) APARTMENT HOUSES 9 STORIES AND OVER:**

Date of Survey	Apartments Surveyed	Apartments Vacant	% Vacant
October 1, 1941	60,943	6,748	11.1%
October 1, 1942	63,943	6,240	9.8%
February 15, 1943	64,105	3,927	6.1%
June 15, 1943	64,211	2,542	4.0%
October 1, 1943	64,204	1,404	2.2%
February 15, 1944	64,235	619	1.0%

443

(2) 6-STORY ELEVATOR APARTMENT HOUSES:

Date of Survey	Apartments Surveyed	Apartments Vacant	% Vacant
October 1, 1941	12,969	1,149	8.9%
October 1, 1942	13,898	984	7.1%
February 15, 1943	13,897	617	4.4%
June 15, 1943	13,897	433	3.1%
October 1, 1943	13,897	240	1.7%
February 15, 1944	13,897	69	0.5%

(3) WALK-UP APARTMENTS:

Date of Survey	Apartments Surveyed	Apartments Vacant	% Vacant
October 1, 1941	7,855	595	7.6%
October 1, 1942	8,026	625	7.8%
February 15, 1943	8,026	454	5.7%
June 15, 1943	8,026	291	3.6%
October 1, 1943	8,026	191	2.4%
February 15, 1944	8,026	66	0.8%

444

Plaintiff's Exhibit 13.

SURVEY OF VACANCIES IN OLD-LAW TENEMENTS BY HOUSING INSPECTORS OF THE DEPARTMENT OF HOUSING & BUILDINGS, OF CITY OF N. Y.

APRIL 1, 1944

	Bldgs. Surveyed	Apts. Surveyed	Apts. Found Vacant
Manhattan	3,532	39,728	3,012
Brooklyn	4,672	23,194	1,511
The Bronx	1,662	11,976	1,420
Totals	9,866	74,898	5,943 or 8%

446

The 74,898 apartments surveyed included a sampling of practically all of the old-law tenement areas in Manhattan, Brooklyn and the Bronx. The buildings containing these apartments number 9,866 and I would like to point out that about 5,000 of these 9,866 buildings are fully rented. In Manhattan, vacancies are found in only one-third of the 3,532 old-law tenements; two-thirds of these buildings are fully rented.

Many of the old-law tenements that have vacancies, have only one vacancy each. Of course, some of them have vacancies as high as 50% or more but they are usually cold-water flats and in many instances have been foreclosed. Some of these old-law tenements still have an inadequate number of water-closets and others even lack hot water supply. Here is a list of ten old-law tenements in the Borough of Manhattan with unusually high vacancies:

447

- (1) 248 East 7th Street: 12 vacancies out of 24 apartments; foreclosed by mortgagee, October 28, 1943.

Plaintiff's Exhibit 13.

448

(2) 250 1/2 East 7th Street: 12 vacancies out of 24 apartments; foreclosed by mortgagee, October 28, 1943.

(3) 84 East 7th Street: 5 vacancies out of 8 apartments; foreclosed by mortgagee, October 28, 1943.

(4) 208 East 88th Street: 12 vacancies out of 18 apartments; foreclosed by mortgagee, November 22, 1943.

449

(5) 310 East 109th Street: 10 vacancies out of 15 apartments; foreclosed by mortgagee, February 17, 1944.

(6) 332 East 109th Street: 8 vacancies out of 15 apartments; foreclosed by mortgagee, March 18, 1944.

(7) 1429 Amsterdam Avenue: 9 vacancies out of 18 apartments; foreclosed by mortgagee, November 4, 1943.

(8) 1453 Amsterdam Avenue: 11 vacancies out of 18 apartments; foreclosed by mortgagee, October 30, 1941.

(9) 1207 First Avenue: 11 vacancies out of 18 apartments; foreclosed by mortgagee, January 19, 1937.

450

(10) 2070 First Avenue: 12 vacancies out of 20 apartments; foreclosed by mortgagee June 4, 1942.

The next group of buildings in the old-law tenement-class that the protestants probably know very little about are the vacant and abandoned structures that the Department of Housing and Buildings of the City of New York officially classi-

fied as "Unfit for human habitation." They are
 tenements the Department ordered closed because
 of the failure of their owners to remove serious
 violations of the Multiple Dwellings Law. At the
 close of 1936, when the enforcement of fire-
 retarding and proper sanitary facilities for these
 buildings started vigorously, there were in the
 City of New York 2,027 closed and abandoned
 old-law tenements with a total of 17,018 apart-
 ments. By the end of 1937 the total jumped to
 5,065 closed and abandoned old-law tenements
 with a total of 44,510 apartments. That means
 an increase of 3,038 closed and abandoned old-law
 tenements with an additional 27,492 apartments.
 The foreclosure record of these 3,038 old-law ten-
 ements that were closed or abandoned during 1937
 should make interesting but sad reading. Some
 of them were foreclosed during 1937, others a
 year or two previously and the remaining num-
 ber were foreclosed after 1937. No wonder the
 Federal and State governments found it proper
 to co-operate with this City through its Housing
 Authority in building public housing for thou-
 sands of families of low income. As a result of
 either demolishing or renovating some of the
 5,065 old-law tenements that were closed or aban-
 doned by December 31, 1937, there remained on
 December 31, 1943 (see Appendix D, post, p. 27),
 3,750 closed and abandoned old-law tenements
 with a total of 28,677 apartments. These 28,677
 apartments are "unfit for human habitation" and
 probably will not again be re-occupied—except,
 in some instances of desirable rehabilitation, after
 the war. However, if the protestants are look-
 ing for something to justify high vacancies in the
 old-law tenement class they may be obliged to

Plaintiff's Exhibit 13.

include these 28,677 apartments that are "unfit for human habitation" but represent 6.2% of the total number of apartments classified as old-law tenements.

APPENDIX D.

VACANT OLD-LAW TENEMENTS "UNFIT FOR HUMAN HABITATION."*

	Manhattan		Bronx		Brooklyn		Queens		Richmond		Total New York City	
	Bldgs.	Apts.	Bldgs.	Apts.	Bldgs.	Apts.	Bldgs.	Apts.	Bldgs.	Apts.	Bldgs.	Apts.
Dec. 31												
1936	1068	11921	101	734	831	4252	7	36	20	75	2027	17018
1937	2947	32420	176	1340	1868	10401	51	255	23	94	5065	44510
1938	3130	33144	160	1152	1641	9077	46	202	21	75	4998	43650
1939	2671	27515	128	964	1643	8921	49	245	17	59	4508	37704
1940	2640	25894	117	893	1492	7914	48	241	12	51	4309	34993
1941	2342	22130	110	841	1562	8092	35	176	11	48	4060	31287
1942	2193	20514	125	926	1463	7637	34	170	10	42	3825	29289
1943	2269	21314	126	932	1310	6214	34	172	11	45	3750	28677

* SOURCE: Department of Housing & Buildings of the City of New York.

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Plaintiff's Exhibit 14.

APPENDIX J.

**REAL ESTATE TAX LEVIES IN NEW YORK
CITY 1924-1943 ***

SHOWING THE UNCOLLECTED AMOUNT AT THE END OF
EACH YEAR AND THE PERCENTAGE OF THE
LEVY UNCOLLECTED.

Year	Levy	Amount Uncollected at End of Year	Percentage Uncollected at End of Year
1924	\$306,967,641	\$ 29,641,930	9.66%
1925	321,956,183	30,624,971	9.51%
1926	355,042,424	36,344,451	10.24%
1927	394,929,498	45,016,312	11.40%
1928	434,712,296	55,932,083	12.87%
1929	458,197,585	66,666,326	14.55%
1930	488,611,596	71,224,445	14.58%
1931	504,987,915	89,391,426	17.70%
1932	526,206,103	139,233,534	26.46%
1933	449,536,372	118,759,214	26.42%
1934	472,544,112	100,270,620	21.22%
1935	469,370,548	74,015,451	15.77%
1936	453,546,219	52,649,465	11.61%
1937	460,246,376	47,035,080	10.22%
1938	490,675,930	49,070,064	10.00%
1939-40	492,476,164	42,859,021	8.70%
1940-41	496,746,660	44,171,217	8.89%
1941-42	483,516,143	38,553,294	7.97%
1942-43	483,940,316	37,553,707	7.76%

* SOURCE: Department of Finance, City of New York.

Plaintiff's Exhibit 15.

APPENDIX B.

VACANCY SURVEY OF COMPETITIVE APARTMENTS IN MANHATTAN.*

(Not including old-law tenements)

Date of Survey:	% Vacant:
October 1, 1924	11.4%
October 1, 1925	12.2%
October 1, 1926	9.5%
October 1, 1927	9.0%
October 1, 1928	9.4%
December 1, 1929	9.2%
October 1, 1930	13.2%
October 1, 1931	13.6%
October 1, 1932	17.7%
October 15, 1933	13.2%
November 1, 1934	8.4%
November 15, 1935	7.6%
November 1, 1936	4.9%
November 1, 1937	5.5%
November 1, 1938	6.6%
November 1, 1939	7.5%
October 1, 1940	10.9%
October 1, 1941	10.3%
October 1, 1942	8.0%
October 1, 1943	2.1%
February 15, 1944	0.875%

* SOURCE: The Real Estate Board of New York, Bulletin of Management Division. Copy on file in the Municipal Reference Library, 2230 Municipal Building, Manhattan.

Plaintiff's Exhibit 16.

APPENDIX E.

MANHATTAN FORECLOSURES DURING 1943.*

100 INSTANCES OF AMOUNTS DUE ON MORTGAGES EXCEED THE ASSESSED VALUE.

Block #	Lot #	Address	Date Conveyed	Amount Due on Mortgage	Assessed Value 1943-1944
107	48	273 Water St.	6/25/43	\$ 42,600.57	\$ 11,000
216	12	384 Washington St.	5/17/43	22,467.52	17,000
268	37	39/41 Montgomery St.	4/21/43	29,199.98	22,000
285	16	219 E. Broadway	5/21/43	47,716.08	39,000
323	62	334 1/2 Delancey St.	8/ 5/43	80,306.48	76,000
333	43	58 Columbia St.	10/27/43	17,225.21	15,500
334	54	102 Columbia St.	9/ 17/43	54,767.28	50,000
349	49	173 Stanton St.	8/12/43	15,374.34	14,000
350	26	19 Clinton St.	10/20/43	29,282.64	29,000
353	43	122 Delancey St.	9/27/43	85,907.71	80,000
353	70	97 Suffolk St.	2/27/43	21,669.59	21,000
378	19	724 East 9 St.	8/25/43	11,304.56	10,500
393	29	644 E. 11th St.	6/ 7/43	11,038.12	9,000
394	50	635 E. 11th St.	8/26/43	19,477.38	17,000
397	22/24	181/3 E. 2nd St.	8/17/43	54,801.29	54,000
402	29	172/6 E. 7th St.	7/ 7/43	101,014.96	85,000
406	20	528 E. 13th St.	10/11/43	31,298.55	28,000
423	25	111 Chrystie St.	3/31/43	31,957.88	27,000
433	28	89/93 Ave. A	7/ 8/43	141,579.70	105,000
444	33	88 East 3rd St.	8/12/43	21,317.87	16,000
448	52	307 E. 6th St.	9/ 3/43	23,640.97	14,500
449	56	51 E. 7th St.	6/23/43	19,197.46	18,000
460	40/42	69/73 2nd Ave.	5/25/43	127,073.39	104,000
470	9	365/9 Broome St.	7/22/43	104,489.08	100,000
518	35	146 Sullivan St.	5/20/43	26,679.86	25,000
526	57	184 Bleecker St.	1/28/43	20,462.63	17,000
529	7	656/8 Broadway	1/21/43	323,653.89	254,000
561	5	47/59 University Pl.	9/ 2/43	1,135,400.24	1,070,000
573	31	20/22 W. 10th St.	3/ 2/43	68,311.13	68,000
573	34	16 W. 10th St.	5/ 6/43	59,024.83	53,000
574	54	19 W. 10th St.	6/ 5/43	62,981.57	47,000
568	26	15/19 E. 10th St.	5/ 3/43	190,674.89	170,000
592	82	129/35 Washington Pl.	2/27/43	255,251.55	230,000
618	17	232 W. 14th St.	5/27/43	47,241.05	38,000
640	52	336 W. 12th St.	5/14/43	24,928.85	21,000
735	60	438 W. 38th St.	4/ 1/43	21,069.30	20,000

* SOURCE: Real Estate Record and Tax Department of City of N. Y.

Plaintiff's Exhibit 16.

Block #	Lot #	Address	Date Conveyed	Amount Due on Mortgage	Assessed Val 1943-1944
788	86	594 8th Ave.	2/20/43	846,151.37	700,000
793	56	130 1/2 W. 18th St.	1/26/43	32,445.87	30,000
803	49	114 W. 28th St.	9/18/43	29,678.00	27,000
816	54	20 W. 15th St.	2/26/43	33,144.42	18,500
849	53	36 E. 21st St.	3/29/43	33,590.13	22,000
898	25	245 East 17th St.	6/9/43	60,109.30	59,000
883	67	113 Lexington Ave.	6/29/43	31,298.65	23,000
909	21	241 East 28th St.	5/25/43	18,191.55	15,500
1144	18	135 W. 72nd St.	1/11/43	81,466.52	73,000
1150	41	120 1/8 W. 79th St.	9/3/43	685,521.72	675,000
1149	58	162 West 78th St.	4/22/43	28,308.76	24,500
1186	58	333 West 78th St.	8/20/43	17,075.09	16,000
1216	54	152 1/8 W. 86th St.	4/5/43	404,813.39	385,000
1218	29	107 W. 87th St.	7/7/43	18,067.20	15,500
1219	21	123 West 88th St.	10/29/43	35,377.18	15,000
1232	1	500 West End Ave.	3/26/43	666,300.00	645,000
1233	29	520 1/8 Amsterdam Ave.	9/9/43	954,034.91	690,000
1233	33	200 1/6 W. 86 St.	1/6/43	2,901,719.53	2,510,000
1252	1	200 1/1 Riverside Dr.	3/23/43	403,322.61	325,000
1251	37	186 Riverside Dr.	6/22/43	1,100,000.00	875,000
1311	161	122 E. 57th St.	12/27/43	88,526.41	84,000
1346	102	305 E. 53rd St.	4/16/43	16,629.62	12,000
1406	16/17	139 1/4 E. 71st St.	4/14/43	175,617.64	174,000
1439	36	338 1/4 E. 65th St.	8/20/43	44,244.04	42,000
1452	6	313 1/9 E. 77th St.	3/13/43	219,788.71	200,000
1487	8	507 1/9 E. 75th St.	4/17/43	45,039.95	39,000
1493	35	944 Park Ave.	2/8/43	478,505.05	425,000
1501	33	1100 1/6 Park Ave.	2/1/43	1,877,551.81	1,715,000
1501	56	1246 1/8 Madison Ave.	5/22/43	1,406,891.99	1,215,000
1513	1	1001 Park Ave.	2/8/43	666,384.98	635,000
1515	24	153 1/5 E. 86th St.	1/30/43	338,974.79	245,000
1517	9	111 1/9 E. 88th St.	10/29/43	504,308.88	450,000
1531	36	226 E. 86th St.	6/21/43	71,420.04	65,000
1541	9	213 E. 95th St.	7/23/43	21,383.01	16,500
1579	33	534 E. 83rd St.	10/6/43	27,384.12	20,000
1575	49	1510 1/2 York Ave.	6/9/43	131,787.89	98,000
1595	44	12 W. 112th St.	1/21/43	20,373.62	17,000
1598	69	92 Lenox Ave.	4/21/43	70,933.99	53,000
1604	34	65 E. 98th St.	6/17/43	23,846.95	19,000
1674	1	1984 2nd Ave.	8/24/43	26,280.27	22,000
1674	10	313 1/5 E. 102nd St.	1/26/43	33,513.40	27,000
1677	2	2042 2nd Ave.	10/7/43	16,637.79	15,000
1687	44	312 1/4 E. 116th St.	1/29/43	49,988.45	44,000

Plaintiff's Exhibit 16.

Block #	Lot #	Address	Date Conveyed	Amount Due on Mortgage	Assessed Value 1943-1944
1721	2	242 Lenox Ave.	1/29/43	21,892.12	18,000
1749	48	60 W. 125th St.	9/20/43	35,893.10	29,000
1784	13	227/9 E. 119th St.	5/19/43	41,288.20	33,000
1789	16	233/5 E. 124th St.	3/ 3/43	41,334.84	34,000
1824	30	83 Lenox Ave.	3/26/43	31,598.40	25,500
1844	27	3/5 W. 108th St.	9/ 8/43	80,578.75	75,000
1857	47	126 W. 103rd St.	5/15/43	30,422.76	28,000
1874	22	2680/4 Broadway	3/ 4/43	466,780.24	420,000
1875	29	880/90 Amsterdam Ave.	5/19/43	163,769.76	155,000
1881	7/8	249/51 W. 109th St.	5/17/43	79,973.79	70,000
1884	48	536/8 W. 113th St.	3/25/43	213,337.30	195,000
1883	18	521 W. 111th St.	2/16/43	154,400.00	140,000
1895	52	603/7 W. 113th St.	7/ 6/43	210,363.05	145,000
1943	58	362 W. 117th St.	9/24/43	17,741.69	16,000
1952	2/102	377 W. 125th St.	3/23/43	53,029.22	28,000
1964	8	439 W. 123rd St.	2/ 6/43	118,605.61	110,000
1966	62	417 W. 125th St.	9/29/43	33,278.00	19,000
2084	1	3680 Broadway	2/ 8/43	41,788.68	33,000
2088	100	606/16 W. 142nd St.	7/27/43	258,257.43	240,000
2165	65	1467/9 St. Nicholas Ave.	9/ 1/43	112,648.36	105,000
2170	1	4380/90 Broadway	8/14/43	159,616.80	140,000

Plaintiff's Exhibit 17.**APPENDIX E****MANHATTAN DEEDS SURRENDERED IN LIEU OF FORECLOSURE DURING 1943.*****100 INSTANCES OF AMOUNTS DUE ON MORTGAGES EXCEED THE ASSESSED VALUE.**

Block #	Lot #	Address	Date Conveyed	Amount Due on Mortgage	Assessed Value 1943-1944
50	17	96/98 Liberty St.	12/27/43	\$ 700,000	\$ 270,000
99	25/6	18/24 Ferry St.	2/27/43	110,000	85,000
112	7	364/6 Pearl St.	3/ 2/43	14,000	13,000
135	18	96 Chambers St.	7/ 7/43	59,700	55,000
139	24	191 Reade St.	2/ 1/43	33,000	30,000
185	7	219 West St.	5/25/43	30,000	26,000
257	31	2 Rutgers Pl.	8/26/43	25,700	24,500

* SOURCE: Real Estate Record and Tax Department of the City of New York.

Plaintiff's Exhibit 17.

Block #	Lot #	Address	Date Conveyed	Amount Due on Mortgage	Assessed Value 1913 1914	
278	58	54 Oliver St.	3/15/43	20,000	19,000	
313	13	391 Grand St.	9/8/43	31,780	30,000	
338	54	239 Rivington St.	10/25/43	7,920	6,000	
372	13	280 E. 3rd St.	12/1/43	18,400	17,500	
377	67	241 East 7th St.	3/4/43	17,800	16,500	
384	28	247 East 2nd St.	3/9/43	14,000	9,500	
384	40	352 E. Houston St.	3/6/43	11,000	8,500	
389	59	603 E. 6th St.	10/13/43	14,700	14,500	
404	31	168 Avenue B.	9/23/43	15,000	14,000	
406	46	537 East 12th St.	1/25/43	13,398	12,000	
434	26	126 East 7th St.	2/27/43	15,000	13,500	
434	43	429 East 6th St.	9/23/43	17,840	14,000	
451	21	220 East 10th St.	5/25/43	24,500	24,000	
392	48	627 East 9th St.	10/18/43	17,622	17,000	
382	57	705 East 12th St.	9/21/43	11,000	9,500	
440	12	435 E. 12th St.	9/11/43	14,175	12,500	
405	56	511 E. 11th St.	7/28/43	18,200	15,000	
438	48	259 East 10th St.	8/14/43	17,200	15,500	
526	34	69 Macdougal St.	7/29/43	20,000	19,000	
552	53	110 Waverly Pl.	7/21/43	40,000	29,000	
617	42	228 W. 13th St.	11/23/43	20,000	19,000	
612	12	38 Perry St.	2/18/43	18,500	17,500	
805	50	109 West 29th St.			30,000	
	51	107 West 29th St.			31,000	
	56	839 Sixth Ave.			50,000	
	57	841 Sixth Ave.	7/16/43	332,140	55,000	\$248,000
	58	843 Sixth Ave.			13,000	
	59	845 Sixth Ave.			61,000	
	65	108 W. 30th St.			58,000	
880	69	50 Lexington Ave.	3/12/43	76,000	28,500	57,500
	70	52 Lexington Ave.			29,000	
885	66	153 Lexington Ave.	9/17/43	42,000	17,000	34,000
	67	151 Lexington Ave.			17,000	
888	58	213 Lexington Ave.	5/28/43	28,000	21,500	
865	8	7/9 E. 35th St.	8/20/43	215,000	165,000	
894	14	119 E. 38th St.	10/7/43	40,000	33,000	
902	12	213 E. 21st St.	9/13/43	26,210	24,500	
924	47	336 E. 19th St.	5/15/43	13,020	13,000	
973	4	250 Avenue A.	1/15/43	18,500	13,500	
135	21	131 W. 63rd St.	5/27/43	13,500	12,500	
134	45	120 W. 63rd St.	6/9/43	28,875	24,000	
124	5	59/65 W. 71st St.	7/14/43	331,500	315,000	
208	Pro	61 W. 94th St.	7/15/43	17,500	16,000	

Plaintiff's Exhibit 17.

Block #	Lot #	Address	Date Conveyed	Amount Due on Mortgage	Assessed Value 1943-1944	
4300	21	643 Lexington Ave.			118,000	
	20	645 "			120,000	
	53	647 "			130,000	
	52	649 "			80,000	
	51	651 "			82,000	
	152	653 "			95,000	
	50	655 "			110,000	\$99
	151	134 E. 55th St.	3/11/43	1,656,275.50	21,000	
	150	136 "			55,000	
	49	138 "			40,000	
	148	140 "			40,000	
	48	142 "			50,000	
	47	144 "			52,000	
1242	40	2532 Broadway	7/12/43	84,750	83,000	
1375	17	658 60 Madison Ave.	12/31/43	401,714	395,000	
1392	60	24 E. 78th St.	2/6/43	50,000	39,000	
1405	64	120 E. 71st St.	7/22/43	39,800	37,000	
1412	1	900 Fifth Ave.	2/18/43	475,000	405,000	
1492	56	1070 Madison Ave.	2/25/43	374,529	305,000	
1507	56	16 E. 96th St.	10/2/43	420,004	405,000	
1509	20	1177 85 Lexington Ave.	11/1/43	504,500	485,000	
1524	16	135 E. 92nd St.	1/30/43	33,000	29,000	
1564	147	404 E. 85th St.	2/2/43	17,000	10,000	
1609	59	1530 Madison Ave.	9/24/43	32,000	28,000	
1615	48	62 E. 110th St.	6/26/43	26,500	21,000	
1637	60	128 E. 110th St.	3/16/43	15,500	14,500	
1657	27	2091 2nd Ave.	10/29/43	11,370	11,000	
1653	121	243 E. 103rd St.	3/15/43	9,000	7,500	
1661	121	245 E. 111th St.	3/15/43	15,000	11,000	
1693	12	349 E. 101st St.	9/24/43	29,544	28,000	
1716	40	1714 Park Ave.	9/24/43	30,460	27,000	
1746	42	66 E. 120th St.	3/12/43	12,000	9,500	
1756	52	2089 Madison Ave.	4/27/43	14,000	13,500	
1757	14	2102 Madison Ave.	3/12/43	22,600	9,500	
1730	51	28 W. 133rd St.	3/12/43	12,000	8,000	
1733	34	2222 5th Ave.	3/3/43	18,000	17,500	
	35	2224 5th Ave.	3/3/43	18,000	17,500	
	37	2228 5th Ave.	3/3/43	18,000	17,500	
	38	2230 5th Ave.	3/3/43	18,000	17,500	
1829	5	273 W. 113th St.	2/25/43	22,475	21,000	
	6	271 W. 113th St.	2/25/43	22,475	21,000	
1847	64	308 W. 114th St.	9/14/43	19,000	17,000	
1921	46	124 W. 137th St.	3/12/43	25,400	18,000	
1944	39	308 W. 118th St.	4/12/43	20,000	19,000	
1985	29	1420 Amsterdam Ave.	12/22/43	45,626	34,000	
2075	56	560 W. 144th St.	9/30/43	144,598	142,500	
2080	58	564 W. 149th St.	5/5/43	34,150	29,000	
2109	66	48 Sylvan Ter.	11/29/43	5,000	2,700	
2157	60	555 W. 185th St.	10/3/43	10,421	7,000	

Plaintiff's Exhibit 18.**APPENDIX I.****NEW YORK CITY BASIC REAL ESTATE
TAX RATES**

Tax Year	Basic City Rate
1939-40	2.82
1940-41	2.84
1941-42	2.80
1942-43	2.79
1943-44	2.89
1944-45	2.75 (probable)*

* Final figure will not be available until after May 25, 1944.

SOURCE: Chief Assessor's Office, Tax Department of City of
N. Y.

Plaintiff's Exhibit 19.**APPENDIX I.****47 MORTGAGES REFINANCED IN 1943 AT 7%
INCREASE IN PRINCIPAL**

The following article appeared in the March 29, 1944 news letter of James Felt & Company by James Felt, its President, who is also a governor of the New York Real Estate Board:

AMORTIZATION AND DEPRECIATION.

According to the Mortgage Conference Bulletin, 47 mortgage loans on 6-story elevator apartments that were built between 1935 and 1938 were refinanced during 1943. Original financing of the entire group aggregated \$8,437,000, of which \$790,000 was retired through amortization, leaving an unpaid balance of \$7,647,000. New loans

were placed, aggregating \$8,182,000—an increase of \$535,000.

Despite the 7% increase in principal, new mortgages were obtained at substantially lower interest rates than the old mortgages—4.22%, as against 4.80%.

Amortization has frequently been regarded as an adequate means of offsetting depreciation and obsolescence. Experience with the 47 loans summarized reveals the failure of amortization as an offset to depreciation. As soon as a more favorable mortgage market opens, owners refinance and frequently obtain increased loans, which, in effect, permit a refund to the owner of whatever payments have been made in reduction of mortgage principal. If we are to develop a sound system for protecting owners, mortgagees and the general community from the ravaging effects of deterioration and obsolescence, retirement funds should be frozen and on a compulsory basis.

Statement as to Evidence.

The foregoing case contains all the evidence adduced and proceedings had upon the trial of this action, together with the exceptions of both sides taken upon said trial.

484 **Opinion by Mr. Justice Fennelly.**

(N. Y. Law Journal, August 1, 1944.)

485 East N. Y. Sav. Bank v. Hahn—This is an action commenced by the plaintiff on March 27, 1944, to foreclose a mortgage upon real estate. The only default is as to the principal amount, which became due April 1, 1924, and has not been extended. Interest, taxes and the amortization as provided by chapter 93 of the Laws of 1943 have been paid. It is the plaintiff's contention that this latter enactment, that extended the mortgage moratorium and which covered this mortgage was invalid and unconstitutional, at the time it became a law, or at any rate at the time of the commencement of this action.

If plaintiff is correct in its position, judgment of foreclosure must be granted.

486 The legislation attacked impairs the obligations of the mortgage contract. It can only be sustained as a proper exercise of the police power, if the emergency which originally called the mortgage moratorium into being in 1933 existed at the time of its enactment and at the time of the commencement of this action and that the emergency was a temporary one. At the time of the 1943 renewal of the moratorium legislation which extended it to July 1, 1944, the Legislature made the finding that in its judgment, the public emergency of 1933 still continued and existed. It provided for an amortization of 1 percent. (Subsequently the 1944 Legislature in again renewing for a year the Mortgage Moratorium Law, provided for an amortization of 2 per cent.) The question of whether or not these amortization provisions to alleviate the situation of mortgagees kept pace

with improvement in conditions, is not before the court, and no observation will be made thereon.

While great respect must be given the legislative declaration of the continued existence of the emergency, the question of whether it still existed, is always open to judicial inquiry (*Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U. S., 398).

A careful and exhaustive preparation of this case has been made by plaintiff's counsel. It is shown that there are ample funds available for mortgage investment. As of January 1, 1944, the amount invested by savings banks in mortgages in New York State was slightly less than \$3,000,000,000, and there was available for mortgage lending within the 65 per cent. of assets limit provided by law, a sum in excess of \$1,000,000,000.

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The mortgage market is, of course, inseparably connected with the real estate market. Testimony was submitted by plaintiff that can well be credited, that the real estate market in 1943 was active and gave indications of being more active in 1944. The testimony shows and it is a matter of common knowledge, that much foreclosed institutional real estate has been liquidated. For the purpose of collecting and distributing mortgage and real estate information to the savings banks supporting the service, New York State is divided into groups. Group 5 embraces Long Island and Staten Island. The chief statistician of this group prepared figures showing real estate holdings of this group that resulted from mortgage investments. The figures show that member banks in Brooklyn had an overhang of real estate as of the end of 1939 of \$49,360,469; and as of January 1, 1944, of \$17,105,680. In Queens the figures were (plaintiff's exhibit 6) at the end of

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1939, \$9,808,417; and as of January 1, 1944, \$3,857,742. In Nassau the figures were at the end of 1939, \$2,487,143; and as of January 1, 1944, \$495,952. There is still to be liquidated and was at the time of the commencement of this action a considerable amount of real estate held by savings banks, insurance companies, Home Owners Loan Corporation and the trustees of estates. Not until the holdings of these unwilling owners of real estate have been reduced so that they are no longer a factor in competition with the real estate of those who willingly acquired real estate and are willing but not forced to sell can it be said that there is a normal real estate market.

The Legislature had the right, in its judgment, to determine that abnormal deflation of real property values, in view of these circumstances, existed at the time it enacted the renewal legislation of 1943. This was one of the reasons upon which the original moratorium legislation of 1933 was based. The emergency, in the court's opinion, still existed at the time this action was commenced.

Plaintiff's counsel advances the argument that no alleged emergency of eleven years' duration can be considered temporary. But time is relative. The conditions which created the emergency are righting themselves. The testimony of the statistician for Group 5 shows that in this area from 1933 to 1938 foreclosures exceeded new loans and that from then on the reverse was the case. Liquidation of institutional properties has been steadily going on. The time can reasonably be foreseen when they will no longer be a competitive factor in the real estate market.

The motion made by defendant at the end of plaintiff's case to dismiss the complaint, upon which decision was reserved, is granted, with an exception to plaintiff. Submit judgment upon two days' notice of settlement.

Pleadings and exhibits may be had from the clerk.

Stipulation Settling Case.

IT IS HEREBY STIPULATED that the foregoing record contains all the evidence given upon the trial of this action, together with the exceptions of both sides taken upon said trial, and that the same be settled and ordered on file as the case on appeal and annexed to the judgment roll herein.

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Dated, New York, September , 1944.

**JOHN P. McGRATH,
JOHN J. BUCKLEY,**

Attorneys for Plaintiff-Appellant.

**COLLER & COLLIER,
Attorneys for Defendants-Respondents.**

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Order Settling Case.

On the above stipulation, I HEREBY CERTIFY that the foregoing record contains all the evidence adduced and proceedings had upon the trial of this action, together with exceptions of both sides taken on said trial, and said case is hereby settled and ordered on file as the case on appeal in this action.

Dated, New York, September , 1944.

JOSEPH FENNELLY,
J. S. C.

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Stipulation Waiving Certification.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, judgment roll, and case and exceptions as settled, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof by said Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

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Dated, New York, September , 1944.

JOHN P. McGRATH,
JOHN J. BUCKLEY,
Attorneys for Plaintiff-Appellant.

COLLER & COLLIER,
Attorneys for Defendants-Respondents.

Order Filing Record in Court of Appeals.

Pursuant to Section 616 of the Civil Practice Act, it is

ORDERED that the foregoing printed record be filed in the office of the Clerk of the Court of Appeals of the State of New York.

Dated, New York, September , 1944.

JOSEPH FENNELLY,
J. S. C.

[fol. 167a]. IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of December in the year of our Lord one thousand nine hundred and forty-four, before the Judges of said Court.

Witness, the Hon. Irving Lehman, Chief Judge, Presiding; John Ludden, Clerk.

THE EAST NEW YORK SAVINGS BANK, Appellant,
ag't

ALVIN HAHN & ANO., Impld., &c., Respondents

REMITTITUR—December 30, 1944

Be It Remembered, That on the 4th day of October in the year of our Lord one thousand nine hundred and forty-four, The East New York Savings Bank, the appellant—in this cause, came here unto the Court of Appeals, by John P. McGrath and John J. Buckley, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Supreme Court. And Alvin Hahn and another, the respondents in said cause, afterwards appeared in said Court of Appeals by Collier & Collier, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. John P. McGrath of counsel for the appellant; by Mr. Orrin G. Judd for Attorney General of [fol. 167b] the State of New York; No one appearing for the respondents; brief filed by amicus curiae; and after due deliberation had thereon, did order and adjudge that the judgment of the Supreme Court appealed from herein be and the same hereby is affirmed without costs. Questions arising under the Constitution of the United States were presented and necessarily passed upon by this Court. The appellant contended that Chapter 93 of the Laws of the State of New York for the year 1943 violated Section 10 of Article I and Section 1 of the Fourteenth Amendment of the Constitution of the United States. This court held that the above mentioned Chapter of the Laws did not vio-

late either of those Sections of the Constitution of the United States,—and that the legislation was valid.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, December 30, 1944.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 167c] Reporter's Certificate to opinion omitted in printing.

[fol. 167d] IN COURT OF APPEALS OF NEW YORK

OPINION—December 30, 1944

LEHMAN, Ch. J.:

The legislative declaration in chapter 793 of the Laws of 1933 that "a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit

and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists" did not "create" a legislative power to suspend or change the legal remedies of holders of bonds and mortgages. The existence of conditions "affecting and threatening the welfare, comfort and safety of the people of the state" may, however, furnish the occasion for the exercise of such power. (*Home Bldg. & L. Assn. v. Blaisdell*, 250 U. S. 398; *Matter of People [Tit. & Mtge. Guar. Co.]*, 264 N. Y. 69, 94). Concededly the existence of extraordinary conditions in 1933 as set forth in this legislative declaration and as confirmed by common knowledge, justified the extraordinary remedy that till July 1, 1934, no action should be brought to foreclose a mortgage for a default in the payment of principal. (*Klinke v. Samuels*, 264 N. Y. 144.) Each year thereafter the Legislature on similar findings decreed that the remedy provided in 1933 should remain in force for another year.

In 1943 the Legislature again declared that "The serious public emergency which existed at the time of the enactment of . . . chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three . . . having continued, in the judgment of the Legislature, to the present time and still existing, the provisions of such chapters seven hundred and ninety-three of the laws of nineteen hundred thirty-three . . . shall . . . remain and be in full force and effect until July first, nineteen hundred forty-four" (L. 1943, ch. 93.) The Legislature at the same time provided that an owner of mortgaged premises should not be entitled to claim the benefit of the [fol. 167e] suspension of the right to foreclose the mortgage unless he amortized the principal at the rate of one per cent per annum. The plaintiff challenges the finding of the Legislature that the "serious public emergency" which existed in 1933 still existed in 1943, and urges that the exercise of the power of the Legislature to provide an extraordinary remedy for extraordinary conditions which was justified in 1933 may not be invoked in 1943 when the abnormal conditions of an earlier time have disappeared.

The Legislature has the responsibility of determining when extraordinary conditions exist "threatening the welfare, comfort and safety of the people of the state." Within the limits of its powers as defined by the Constitution of the

State and as limited by the Constitution of the United States, choice of the appropriate remedy for such conditions is then vested in the Legislature. When the legislative choice of a remedy is challenged on the ground that it transcends the limits placed by the Constitution of the State or the Constitution of the United States upon the power of the Legislature and that it impairs the obligation of a contract or deprives a person of his property without due process of law, the legislative finding that a threatening public emergency exists is not conclusive. Judicial inquiry is not precluded whether the remedy chosen is within the power of a State Legislature "construed in harmony with the constitutional limitation on that power." (*Matter of People [Tit. & Mtge. Guar. Co.]*, 264 N. Y. 69, 84) but upon such an inquiry the legislative findings are entitled to great weight and the legislative remedy will not be stricken down unless its invalidity is clearly established.

An extraordinary remedy which is appropriate and legitimate in an exigency resulting from abnormal conditions may be inappropriate and beyond the limits of the power of a State if temporary impairment of the obligation of a contract is continued after the exigency has passed. (*Block v. Hirsch*, 256 U. S. 135, 157.) When this court sustained the validity of limitations upon the remedies of the holder of a bond and mortgage created by chapter 793 of the Laws of 1933, we said that "such legislation, reasonably seeking only *temporary relief*, is not unconstitutional." (*Klinke v. Samuels*, *supra*; italics are new.) "It is always open to judicial inquiry whether the exigency still exists upon [fol. 167f] which the continued operation of the law depends." (*Home Bldg. & L. Assn. v. Blaisdell*, *supra*, p. 442.)

Doubtless such a judicial inquiry would disclose that many—perhaps all—of the adverse conditions created by the "abnormal disruption in economic . . . processes" which, as the Legislature found, existed in 1933 and resulted in a "public emergency," disappeared before 1943. The Legislature did not, in 1943, find that these conditions still existed. It found only that the "serious public emergency" existing in 1933 and "*resulting*" from these conditions, still existed. In 1943 the fact that payrolls and savings bank deposits had increased in almost unprecedented degree was a matter of common knowledge. The Legislature could not ignore the great changes in the eco-

nomie situation. On the other hand, an accumulation of past due mortgages resulting from the ten-year-old ban upon actions to foreclose mortgages for default in the payment of principal might reasonably cause apprehension that a flood of foreclosure actions would follow removal of the ban and might itself justify a statute reasonably calculated to stem the impending flood. Reports which legislative committees made to the Legislature in 1938 and 1943 as well as a message of the Governor called to the attention of the Legislature also the fact that abnormal conditions incident to a war economy or resulting from other causes might still constitute a threat "to the welfare, comfort and safety of the people of the state" and might call for the exercise of the legislative power to provide an extraordinary remedy for extraordinary conditions.

The presumption is that the Legislature "inquired and found" that under the conditions then disclosed there was need for a continuance of the suspension of the right of holders of bonds and mortgages to foreclose for default in the payment of the principal. (*Szold v. Outlet Embroidery Supply Co.*, 274 N. Y. 271, 278.) It is entirely unimportant whether the conditions then existing have created a new emergency, as said by the Governor in his message, or have, as the Legislature said, resulted in the continuance of an emergency itself created by conditions which have run their course. The question which the court must decide is whether the Legislature in the challenged statute has provided an appropriate remedy to tide over an exigency resulting from present conditions. We have [fol. 167g] said in an analogous case that: "Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the exercise of the reserved power of the state and whether the remedy adopted by the state is reasonable and legitimate." (*Matter of People [Tit. & Mtge. Guar. Co.]*, *supra*, p. 94.) We conclude that the challenged statute meets that test.

The judgment should be affirmed, with costs.

DISSENTING OPINION

LEWIS, J. (dissenting):

In this action to foreclose a mortgage on real property a challenge by a mortgagee to the constitutionality of the 1943 Mortgage Moratorium Law (L. 1943, ch. 93) has been

denied at Special Term. The defendants-mortgagors, who offered no proof in opposition to the plaintiff's case, have been awarded a judgment dismissing the complaint upon the ground that the evidence presented by the plaintiff-mortgagee failed to establish a cause of action.

Coming to us by direct appeal on constitutional grounds (Civ. Prac. Act, § 588, subd. 4) the case presents the question whether the undisputed facts of record afford a valid basis for the legislative finding upon which the challenged statute rests, viz., that the public emergency, which existed in 1933—at the time of the enactment of section 1077-a of the Civil Practice Act (L. 1933, ch. 793)—continued and still constituted a public emergency on March 11, 1943, when chapter 93 of the Laws of 1943 became a law.

By the 1933 Mortgage Moratorium Law (L. 1933, ch. 793) the Legislature declared "... that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination." Then follow the moratory provisions which, during the emergency thus declared, suspended the maintenance of certain foreclosure actions and related actions there defined.

[fol. 167h] Thereafter, in each of the ten succeeding years (except in one instance where the extension was for two years [L. 1941, ch. 782, § 1]) the Legislature extended for a single year the moratory provisions of the 1933 Act, each renewal being based upon a finding that the serious public emergency declared to exist in 1933 had "continued" and was "still existing."

We come then to the statute here called into question (L. 1943, ch. 93) as to which it is important to note that, as in the nine preceding similar laws, the public emergency assigned as the reason for the mortgage moratorium legislation was not some new or different form of abnormality in "economic and financial processes" affecting public welfare within the State. The reason for each succeeding

enactment was the same and is typically expressed in the legislative finding within section 1 of Chapter 93 of the Laws of 1943 with which we are now concerned and which provides in part: "Section 1. The serious public emergency, which existed at the time of the enactment of sections ten hundred and seventy-seven-a . . . of the civil practice act as added by chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three . . . having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters . . . shall, notwithstanding any provision of such chapter, remain and be in full force and effect until July first, nineteen hundred forty-four . . ."

(Emphasis supplied.)

Although we hold in proper respect the declaration by the Legislature that the same public emergency which called forth moratorium legislation in 1933 still existed in 1943, that declaration is not conclusive. "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." (*Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 442.) "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." (*Chastleton Corp. v. Sinclair* [per HOLMES, J.], 264 U. S. 543, 547-8.) In a prior case which dealt with emergency legislation the same jurist had written—"A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." (*Block v. Hirsh*, 256 U. S. 135, 157; see, [fol. 167i] also, *Klinke v. Samuels*, 264 N. Y. 144, 149; *Matter of People [Tit. & Mtge. Guar. Co.]*, 264 N. Y. 69, 95-6.)

Here the basis of the appellant's challenge to the 1943 Moratorium Law is the clause of the Federal Constitution (art. 1, § 10) which forbids enactment by a State of a law impairing a contract obligation. It is not denied that in the public emergency which concededly existed in 1933 the moratorium legislation of that year was a valid exercise of the State's essential reserved power and that the temporary suspension of foreclosure rights possessed by mortgagees was then apposite to emergency relief. "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding

interference with contracts. . . . 'the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power . . . is paramount to any rights under contracts between individuals.' " (HUGHES, Ch. J., writing in *Home Bldg. & L. Assn. v. Blaisdell*, *supra*, pp. 437, 439.) Accepting that rule as a statement of an appropriate and necessary principle of government, the appellant assents that the exigency which fully warranted the enactment of the Moratorium Law of 1933 did not continue into the tenth year thereafter to afford a legal basis for the enactment of the 1943 statute. The appellant's submission is that the invalidity of chapter 93 of the Laws of 1943 is established by the record before us which is said to contain undisputed proof that the emergency of 1933 which concededly warranted the temporary suspension of the exercise by the appellant of its contract rights as a mortgagee, has not "continued" and was not "still existing" in 1943 when the Moratorium Law here in question became effective. If so, the judgment before us for review must be reversed. I pass to a consideration of the evidence.

Among the economic factors existing in 1933 which the Legislature found warranted the moratorium legislation of that year, was "the curtailment of incomes by unemployment." As to that factor the present record shows that between 1933 and 1943 there was in the State of New York [fol. 167j] an increase of 92½% in the number of wage earners employed and an increase of 266% in weekly payrolls. In 1933 the average weekly earnings of employees was \$21.90; in 1943 that average had increased 103.7% to \$44.68. In 1933 the actual number of workers employed in manufacturing was 323,071; in 1943 that number had increased to 735,265.

Other exigent factors found and declared by the Legislature to exist in 1933 were an "abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state . . ." The fact is within our judicial knowledge that the banks of the nation had been closed by a Federal Executive Order in 1933. In that year, the Superintendent of Banks reported a short-

age of currency in the State. At the close of that year his report stated—"Attention was at once centered upon plans for the issuance of scrip. And on March 6, 1933, the Government asked the Legislature for an act authorizing the creation of a State-wide corporation to serve this purpose. Such a bill was passed immediately and the plans for the issuance of scrip against bank deposits moved swiftly forward and were not abandoned until it was definitely known that the National Government was prepared to offer a solution." That report speaks of conditions at or about the time of the "bank holiday" of 1933, nearly six months prior to the enactment of the 1933 Moratorium Law. The record shows however—on the question of improvement in general financial conditions within the State—that on December 31, 1935, the amount of demand and time deposits in all banks—in both commercial and savings banks—aggregated 13.2 billion dollars; on June 30, 1943, the total of those types of deposits had increased to 25.7 billion dollars, an increase of 95% and a maximum for all time. In 1933 the savings banks of the State lost 7.54% of their deposits; in 1943 the savings banks gained 8.57%. In 1933 savings bank depositors withdrew \$392,000,000 more than they deposited; in 1943 the same type of depositors placed in savings banks \$500,000,000 more than they withdrew. In 1933 the total amount of money in the nation was \$45.49 per capita; in February, 1944, the amount of money in circulation was \$151.22 per capita—an increase of more than three times the per capita figure of 1933. In 1933 the aggregate amount of money in circulation in the nation was [fol. 167k] \$5,720,764,000; on February 29, 1944, that aggregate figure had increased to \$20,823,568,000.

The Moratorium Law of 1933 also mentions as a factor prompting the legislation of that year the existence of an "abnormal deflation of real property values". Upon that subject the evidence is that between 1933 and 1944 there was a sharp decline in housing vacancies in the six largest cities of the State. It also appears that in those six cities for the year 1933 the average tax delinquency was 17.3% of the total taxes levied; in 1942 that average was 4.8%. There is evidence that on January 1, 1944, the savings banks of the State had available for new investment in real estate mortgages under section 235, paragraph 6 (d), of the Banking Law a sum in excess of one billion dollars. There is also the significant item of evidence that in 1943

the savings banks loaned on mortgages covering property outside the State—in Pennsylvania, New Jersey and Connecticut—approximately \$100,000,000. Upon the same subject there is also testimony by experts that in the metropolitan area of New York City there was an active real estate market in 1943 and that in that year money was readily available to refinance mortgages on buildings constructed prior to 1931.

The Moratorium Law of 1943, like the nine similar statutes which preceded it, was temporary in operation. It was limited to the exigency which called it forth and which the Legislature expressly declared to be the emergency of 1933, "continued" and "still existing" in 1943. The operation of the Moratorium Law of 1943 could not validly outlast the emergency which prompted its enactment. It could not be so extended as to suspend the contract rights of the appellant mortgagee beyond that emergency. (See *Home Bldg. & L. Assn. v. Blaisdell*, *supra*, p. 447.) The undisputed evidence to which reference has been made leads me to conclude that the emergency which caused the enactment of the Moratorium Law of 1933 was not "still existing" on March 11, 1943, when chapter 93 of the Laws of 1943 became a law. To adjudicate otherwise upon the evidence before us would be in disharmony with the constitutional limitation which the appellant rightly invokes. "Necessarily the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined, and must be discharged [fol. 1671] in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question." (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 554.)

Accordingly I dissent and vote for reversal and the direction of judgment of foreclosure and sale in favor of the plaintiff.

Loughran, Rippey, Conway, Desmond and Thacher, JJ., concur with Lehman, Ch. J.; Lewis, J., dissents in opinion.

Judgment affirmed.

[fol. 168] IN SUPREME COURT OF NEW YORK, KINGS COUNTY

Present: Hon. Algernon I. Nova, Justice.

THE EAST NEW YORK SAVINGS BANK, Plaintiff,

against

ALVIN HAHN and HANNAH HAHN, His Wife, and PEOPLE
OF THE STATE OF NEW YORK, Harold Meyers and Rose
Meyers, Defendants

ORDER ON REMITTITUR—February 13, 1945

The above named plaintiff having appealed to the Court of Appeals of the State of New York, from the judgment of this Court, entered in the office of the Clerk of the County of Kings, on the 18th day of August, 1944, dismissing the complaint at the close of the plaintiff's case upon the ground that on the testimony, exhibits and the entire record presented by the plaintiff, the plaintiff had failed to establish that Chapter 93 of the Laws of 1943 of the State of New York was invalid and unconstitutional at the time it became a law or at the time of the commencement of this action, and said appeal having been duly argued in the Court of Appeals and said Court of Appeals having by an order entered on the 30th day of December, 1944 in the office of the Clerk of the Court of Appeals affirmed the judgment of this Court and the remittitur having been remitted to the Clerk of the [fol. 169] County of Kings,

Now, upon reading and filing the remittitur from the Court of Appeals, and upon the motion of Collier & Collier, Esqs., attorneys for the defendants, Alvin Hahn and Hannah Hahn, it is

Ordered that the order and judgment of the Court of Appeals be and the same hereby are in all respects made the order and judgment of this Court.

Enter.

A. I. Nova, J. S. C.

Granted Feb. 13, 1945. Francis J. Sinnott, Clerk.

[fol. 170] IN SUPREME COURT OF NEW YORK, KINGS COUNTY

THE EAST NEW YORK SAVINGS BANK, Plaintiff,
against

ALVIN HAHN and HANNAH HAHN, His Wife, and PEOPLE
OF THE STATE OF NEW YORK, Harold Meyers and Rose
Meyers, Defendants

JUDGMENT ON REMITTITUR—February 26, 1945

The above named plaintiff having appealed to the Court of Appeals of the State of New York, from the judgment of this Court, entered in the office of the Clerk of the County of Kings, on the 18th day of August, 1944, dismissing the complaint at the close of the plaintiff's case upon the ground that on the testimony, exhibits and the entire record presented by the plaintiff, the plaintiff had failed to establish that Chapter 93 of the Laws of 1943 of the State of New York was invalid and unconstitutional at the time it became a law, or at the time of the commencement of this action, and said appeal having been duly argued in the Court of Appeals and said Court of Appeals having by an order entered on the 30th day of December, 1944, in the office of the Clerk of the Court of Appeals affirmed the judgment of this Court and the remittitur having been remitted to the Clerk of the County of Kings, and the remittitur of the said Court of Appeals having been filed herein, and the order having been entered herein making the order and [fol. 171] judgment of the said Court of Appeals the order and judgment of this Court;

Now, on motion of Collier & Collier, Esqs., attorneys for the defendants, Alvin Hahn and Hannah Hahn, it is hereby

Adjudged that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this court; and it is further

Adjudged that the said judgment entered herein on the 18th day of August, 1944, be and the same hereby is affirmed.

Judgment signed and entered this 26th day of February, 1945.

Francis J. Sinnott, Clerk.

[fols. 172-173] Citation in usual form, showing service on Collier & Collier, omitted in printing.

[fol. 174] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The petition of the East New York Savings Bank, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York entered upon the remittitur of the Court of Appeals of the State of New York, having been filed with the clerk of this court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from a final judgment dated the 26th day of February, 1945, of the Supreme Court of the State of New York, as prayed in said petition, and that the clerk of the Supreme Court of the State of New York, in the County of Kings, shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and seal of said court, a true copy of the material parts of the record herein, [fol. 175] which shall be designated by a praecipe or stipulation of the parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It Is Further Ordered that the said appellant shall give a good and sufficient bond in the sum of Two Hundred and Fifty 00/100 Dollars, that said appellant shall prosecute said appeal to effect and answer all costs, if it fails to make its plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated, March 8th, 1945.

Irving Lehman, Chief Judge of the Court of Appeals of the State of New York.

[fol. 176] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, The East New York Savings Bank, respectfully shows:

Your petitioner, a banking corporation organized and operating under the laws of the State of New York, is the appellant in the above entitled action.

This action was commenced in the Supreme Court of the State of New York, Kings County, to foreclose a mortgage held by the appellant covering certain real property in the Borough of Brooklyn, County of Kings, City and State of New York, owned by the appellees. The action was commenced by the service of copies of the summons and complaint on the appellees on March 27th, 1944.

The mortgage was in the original principal sum of \$5,000 and has since been reduced to \$4,912.50. The mortgage is not in default except as to the principal amount which became due April 1st, 1924. For this default the appellant seeks a judgment of foreclosure and sale.

The complaint contains allegations to the effect that the emergency which originally justified the Legislature of the State of New York in enacting Chapter 793 of the Laws of 1933, commonly known as the mortgage moratorium laws banning foreclosure of mortgages solely for default in payment of principal, had long ceased to exist and that the renewal of the mortgage moratorium legislation, as embodied in Chapter 93 of the Laws of 1943, is an unwarranted and unlawful impairment of the obligation of contracts, in violation of Section 10, Article I of the Constitution of the United States, and an unwarranted deprivation of property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States. These allegations were placed in issue by the denial of the appellees contained in an answer to the said complaint, verified April 11th, 1944.

The action came to trial in the Supreme Court of the State of New York on May 22nd and 23rd, 1944. The

Court having heard the allegations and proofs of the appellant, the appellees moved to dismiss the complaint at the close of the appellant's case on the ground that the appellant had failed to establish a cause of action. The Court reserved decision thereon and the defendant thereupon rested without offering any further proof and renewed the motion to dismiss the complaint, upon which motion the Court reserved decision. The Court thereafter made its decision in an opinion written by Hon. Joseph Fennelly, granting the motion to dismiss the complaint at the end of the plaintiff's case. Judgment of dismissal was there- [fol. 178] after entered on August 18th, 1944.

Thereafter an appeal was taken directly to the Court of Appeals, that being the court of last resort in which a decision could be had in this case, on the ground that the sole question involved was the constitutionality of Chapter 93 of the Laws of 1943. The appeal having been argued, the judgment of the lower court was affirmed in an opinion written by the Hon. Irving Lehman, in which five Justices of the court concurred. The seventh Justice, Hon. Edmund H. Lewis, dissented in a separate opinion and voted to reverse and to grant judgment for the appellant. Thereafter the Court of Appeals of the State of New York sent down its remittitur consisting of an order of affirmance, dated December 30th, 1944, and the record on appeal which was filed in the office of the Clerk of the Supreme Court of the State of New York, Kings County, where said remittitur now remains of record. The said order of the Court of Appeals, dated December 30th, 1944, contains the following recital:

"Questions arising under the Constitution of the United States were presented and necessarily passed upon by this Court. The appellant contended that Chapter 93 of the Laws of the State of New York for the year 1943 violated Section 10 of Article I and Section 1 of the Fourteenth Amendment of the Constitution of the United States. This court held that the above mentioned chapter of the Laws did not violate either of these Sections of the Constitution of the United States,—and that the legislation was valid.—"

Upon said remittitur a final order, making the order and judgment of the Court of Appeals the order and judgment

of the Supreme Court of the State of New York, was granted on February 13th, 1945, and a judgment was entered in the office of the Clerk of the Supreme Court of the State of New [fol. 179] York, Kings County, on February 26th, 1945.

In accordance with the Rules of the Supreme Court of the United States (Rule 46, par. 2; 28 U. S. C. A. Sec. 354), your petitioner respectfully shows to this Court that the case is one in which, under the legislation in force when the Act of January 31st, 1928 (45 Stat. L. 54) was passed, to-wit, under Section 237-a of the Judicial Code (28 U. S. C. A. Sec. 344), a review can be had in the Supreme Court of the United States as a matter of right, on writ of error.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by the Rules of said Supreme Court.

Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of the State of New York, the highest court in said state in which a decision in this cause can be had, to the Supreme Court of the United States in order that the decision and final judgment of the said Supreme Court of the State of New York may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of New York, County of Kings, under his hand and seal of said court, may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security to be required of the petitioner, [fols. 180-197] and that the bond tendered by the petitioner be approved.

Dated, March 5th, 1945.

The East New York Savings Bank, by Edward A. Richards, President.

Duly sworn to by Edward A. Richards. Jurat omitted in printing.

[fol. 198] SUPREME COURT OF THE UNITED STATES

[Title omitted]

• ASSIGNMENT OF ERRORS

Now comes the appellant above named and files herewith its petition for an appeal and says that there are errors in the records and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

First. The Court of Appeals of the State of New York erred in giving judgment affirming the judgment of the court below dismissing the complaint of the appellant as against the appellees, Alvin Hahn and Hannah Hahn, his wife.

Second. The Court of Appeals of the State of New York erred in failing to render judgment in favor of the appellant, reversing the order of the court below dismissing the complaint.

Third. The Court of Appeals of the State of New York erred in holding that Section 93 of the Laws of 1943 of the State of New York is a constitutional act.

Fourth. The Court of Appeals of the State of New York erred in finding that there was an accumulation of past due [fol. 199] mortgages resulting from the ten year old ban upon actions to foreclose mortgages for default in payment of principal.

Fifth. The Court of Appeals of the State of New York erred in finding that there was any reason to cause apprehension that a flood of foreclosure actions would follow removal of the ban on foreclosure for principal defaults sufficient to justify the Legislature of the State of New York in enacting Chapter 93 of the Laws of 1943 of the State of New York.

Sixth. The Court of Appeals of the State of New York erred in finding that abnormal conditions incident to a war economy, or resulting from other causes, might still constitute a threat to the welfare comfort and safety of the people of the state, and that such conditions might form the basis for the exercise of the legislative power to suspend the legal remedies of the holders of bonds and mortgages at

the time of the enactment of Chapter 93 of the Laws of 1943 of the State of New York.

Seventh. The Court of Appeals of the State of New York erred in finding that there was an unrebutted presumption that the Legislature inquired and found that under the conditions disclosed at the time of the enactment of Chapter 93 of the Laws of 1943 of the State of New York, there was need for a continuance of the suspension of the right of holders of bonds and mortgages to foreclose for default in the payment of principal.

Eighth. The Court of Appeals of the State of New York erred in finding that the Legislature found that the public [fol. 200] emergency existing in 1933 continued and still existed at the time of the enactment of Chapter 93 of the Laws of 1943 of the State of New York, although the conditions which brought said emergency about no longer existed.

Ninth. The Court of Appeals of the State of New York erred in finding that there existed any conditions affecting and threatening the welfare, comfort and safety of the people of the state, which furnished the occasion for the exercise of the legislative power to suspend the legal remedies of the holders of bonds and mortgages, at the time of the enactment of Chapter 93 of the Laws of 1943 of the State of New York, or at the time of the commencement of the aforementioned action.

Tenth. The Court of Appeals of the State of New York erred in failing to find that Chapter 93 of the Laws of 1943 of the State of New York was limited to the exigency which called it forth and that such exigency, to wit, the conditions set forth in legislative declaration in Chapter 793 of the Laws of 1933, had expired in 1943.

Eleventh. The Court of Appeals of the State of New York erred in failing to find that Chapter 93 of the Laws of 1943 of the State of New York violates Section 10 of Article 1 of the Constitution of the United States by impairing the obligations of contracts, and violates Section 1 of the Fourteenth Amendment of the Constitution of the United States by depriving the appellant of its property without due process of law.

[fol. 201] For which errors the appellant, The East New York Savings Bank, prays that said final judgment of the

Supreme Court of the State of New York, dated and entered the 26th day of February, 1945, in the above entitled cause, be reviewed by the Supreme Court of the United States and reversed, and a judgment rendered in favor of the appellant and for costs.

Dated, March 6th, 1945.

John P. McGrath, Attorney for Appellant.

[fols. 202-205] Bond on appeal for \$250.00 approved and filed March 13, 1945, omitted in printing.

[fol. 206] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO RECORD

It Is Hereby Stipulated by counsel for both sides in the above cause, that the Clerk, in making up the transcript, shall follow the records and papers shown in the transcript on file in the Court of Appeals of the State of New York and the Supreme Court of the State of New York, without omission or addition.

Dated, March 20th, 1945.

John P. McGrath, Attorneys for Appellants. Collier & Collier, Attorneys for Appellees.

[fol. 207] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 208] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON—Filed April 19, 1945

Comes Now the appellant in the above entitled cause and states that the points upon which he intends to rely in this Court, in this cause, are as follows:

Point I

The recent decisions of this Court compel the conclusion that the New York State Mortgage Moratorium Legislation is no longer valid.

Point II

The continued existence of an emergency is a necessary prerequisite to the validity of the statute.

Point III

The statute under attack cannot be sustained on the ground that a new emergency has arisen.

Point IV

No new emergency has arisen since 1933 to justify the continuance of the moratorium.

[fol. 209]

Point V

The Court of Appeals gives no valid reason to sustain the statute.

DESIGNATION OF PARTS OF RECORD TO BE PRINTED

The appellant reports that the whole of the record, as filed, is necessary for the consideration of the case.

John P. McGrath, John J. Buckley, Attorneys for the Appellant; John P. McGrath, of Counsel for Appellant.

[fols. 210-211] I, Edward H. Collier of Collier and Collier, attorneys of record for the appellees, hereby acknowledge due and timely service of the above statement of points to be relied upon and designation of the parts of the record to be printed and agree that the said designation includes all parts of the record material and necessary to the consideration of the case, and hereby expressly waive all right to file a counter designation of parts of the record to be printed.

Dated April 16, 1943.

Collier & Collier. By Edward H. Collier, Counsel for the Appellees.

[Vol. 212] SUPREME COURT OF THE UNITED STATES

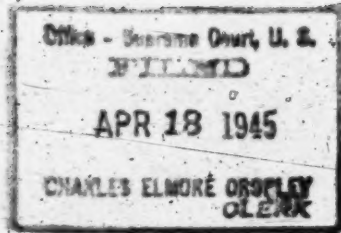
ORDER NOTING PROBABLE JURISDICTION—Filed May 21, 1945

The statement of jurisdiction in this case, having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 49,627, New York, Supreme Court, County of Kings, Term No. 62. The East New York Savings Bank, Appellant, vs. Alvin Hahn and Hannah Hahn. Filed April 18, 1945. Term No. 62 O. T. 1945.

(9456)

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 174 62

THE EAST NEW YORK SAVINGS BANK,
Appellant,
vs.

ALVIN HAHN AND HANNAH HAHN

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

JOHN P. McGRATH,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES •

OCTOBER TERM, 1944

No. 1174

THE EAST NEW YORK SAVINGS BANK,
Appellant,
against
ALVIN HAHN AND HANNAH HAHN, HIS WIFE
Appellees

STATEMENT AS TO JURISDICTION

The case is one in which the validity of a statute of the State of New York, to wit, Chapter 93 of the Laws of 1943 of the State of New York, which statute was approved by the Governor of the State of New York, is drawn in question upon the ground that the statute violates section 10, Article 1 of the Constitution of the United States, and violates section 1 of the Fourteenth Amendment of the Constitution of the United States. The final decision of the Court of Appeals of the State of New York, that being the court of last resort in which a decision could be had in this case, is in favor of the validity of said statute. Therefore, in accordance with the Rules of the Supreme Court of the United States (Rule 46, par. 2; 28 U. S. C. A., Section 354), the petitioner respectfully shows to this Court that the case is one in which, under the legislation in force when the Act of January 31st, 1928 (45 Stat. L. 54) was passed, to wit, under section 237-a of the Judicial Code (28 U. S. C. A., Section 344), a review can be had in the Supreme Court of the United States as a matter of right on writ of error.

The statute, the validity of which is involved, is Chapter 93 of the Session Laws of 1943 of the State of New York. It is a re-enactment and extension of Chapter 793 of the Session Laws of 1933 of the State of New York, commonly known as the "Mortgage Moratorium Law of the State of New York", which became law on the 26th day of August, 1933. Section 2 of said Chapter 793 of the Laws of 1933 amended the Civil Practice Act of the State of New York by inserting therein a new section, numbered section 1077-a, which provided that no action or proceeding for the foreclosure of a mortgage on real property shall be maintainable solely for or on account of a default in the payment of principal of said mortgage, or solely in the payment of any installment of principal secured by such mortgage, although the payment of such principal, or instalment of principal, may be due by the terms of such agreement, bond or mortgage.

By the Laws of 1934, chapter 278; Laws of 1935, chapter 1; Laws of 1936, chapter 86; Laws of 1937, chapter 82; Laws of 1938, chapter 500; Laws of 1939, chapter 606; Laws of 1940, chapter 566; Laws of 1941, chapter 782, the application of section 1077-a of the Civil Practice Act of the State of New York was extended from year to year until July 1st, 1943. Chapter 93 of the Laws of 1943 of the State of New York further extended the application of section 1077-a of the Civil Practice Act to July 1st, 1944.

Chapter 793 of the Laws of 1933 of the State of New York, sections 1 and section 1077-a of section 2, read as follows:

"Section 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtail-

ment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

Section 1077-a. Foreclosure for principal defaults suspended. During the period of the emergency as defined in section ten hundred seventy-seven-g, and notwithstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of a default in the payment of principal secured by such mortgage or solely in the payment of any installment of principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act."

Chapter 93 of the Laws of 1943 of the State of New York reads as follows:

"Section 1. The serious public emergency, which existed at the time of the enactment of sections ten hundred and seventy-seven-a, ten hundred and seventy-seven-b, ten hundred and seventy-seven-c, ten hundred and seventy-seven-d, ten hundred and seventy-seven-e, ten hundred and seventy-seven-f, and ten hundred and seventy-seven-g of the civil practice act, as added by chapter seven hundred and ninety-three of the laws

of nineteen hundred thirty-three, and at the time of the enactment of section ten hundred and seventy-seven-cc of the civil practice act, as added by chapter eight hundred and ninety of the laws of nineteen hundred thirty-four, having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters seven hundred and ninety-three of the laws of nineteen hundred thirty-three and eight hundred and ninety of the laws of nineteen hundred thirty-four shall, notwithstanding any provision of such chapter, remain and be in full force and effect until July first, nineteen hundred forty-four, and in conformity with such extensions, section ten hundred and seventy-seven-g of the civil practice act, as added by such chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three and last amended by chapter seven hundred and eighty-two of the laws of nineteen hundred forty-one, is hereby amended to read as follows:

Sec. 1077-g. Mortgages not affected. The provisions of sections ten hundred seventy-seven-a, ten hundred and seventy-seven-b, ten hundred and seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, and ten hundred seventy-seven-f shall not apply to any mortgage or the modification or extension of any mortgage insured, or hereafter insured under the provisions of the national housing act in effect June twenty-seventh, nineteen hundred thirty-four, as said act has been or is hereafter amended from time to time or to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of section three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any installments or amortization of principal, the payment of which is provided for by extension or modification executed on or after July first, nineteen hundred

thirty-seven, nor to the mortgages so extended or modified, nor to any obligations in connection with or secured by any such mortgages. The provisions of said sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f, shall apply to the final payment of principal of the mortgages so extended or modified if all installments or amortization the payment of which is provided for by such extension or modification are made as provided for by such extension or modification.

Notwithstanding the provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, and ten hundred seventy-seven-f, and in addition to the cases therein provided for the commencement of foreclosure actions, and not in limitation thereof, any owner or holder of a mortgage covering real property as to which there is a default in the payment of any of the principal amount thereof as provided in the instrument creating the mortgage debt or any modification or extension thereof may commence an action to foreclose such mortgage, unless the owner of the mortgaged premises shall pay the unpaid principal amount thereof at the rate of one per centum per annum. Such principal payments shall accrue from July first nineteen hundred forty-two and shall be payable on October first, nineteen hundred forty-two and quarterly thereafter.

In any action or proceeding for the foreclosure of a mortgage on real property or any interest therein or in any foreclosure under article seventeen of the real property law instituted by reason of default in the payment of installment or amortization the payment of which is provided for by such extension or modification, or by the terms of this section, if such action or proceeding has not proceeded to final judgment directing the sale of the mortgaged premises, then such action shall be dismissed and discontinued upon the

payment by any defendant to the plaintiff of the taxable costs and disbursements and the payments of such installment or amortization in default and the remedying of any other default under the terms of such mortgage or extension or modification. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred forty-four."

At the time, and following the enactment of Chapter 93 of the Laws of 1943 of the State of New York, section 1077-a of the Civil Practice Act of the State of New York, read as follows:

"Section 1077-a. Foreclosure for principal defaults suspended.

During the period of the emergency as defined in section ten hundred seventy-seven-g, and notwithstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, or any interest therein, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of a default in the payment of principal secured by such mortgage or solely in the payment of any installment or amortization of principal secured by such mortgage, although the payment of such principal or installment or amortization of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment or amortization of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act.

Notwithstanding the foregoing provisions of this section, any installments or amortization of principal, or principal which, by the terms of such agreement, bond or mortgage, have become due or shall become due and

payable prior to July first, nineteen hundred thirty-four shall become and be due and payable six months after the expiration of such emergency period as now or hereafter defined or extended.

Notwithstanding the foregoing provisions of this section, any installments or amortization of principal, or principal which, by the terms of such agreement, bond or mortgage, shall become due and payable between July first, nineteen hundred thirty-four and July first nineteen hundred thirty-seven, inclusive, shall become and be due and payable one year after the expiration of such emergency period as now or hereafter defined or extended."

Section 1077-a of the Civil Practice Act still continues in force in the State of New York, as hereinabove set forth, except that by Chapter 562 of the Laws of 1944 the application of said section 1077-a was extended and renewed to July 1st, 1945, and the provision requiring the payment of one percent annual amortization, as set forth in Chapter 93 of the Laws of 1943, was modified so as to require two per cent annual amortization of the mortgage principal.

The Court of Appeals of the State of New York rendered its decision herein on December 30th, 1944, in an opinion by the HON. IRVING LEHMAN, concurred in by five of the seven Justices of the court. The seventh Justice, HON. EDMUND H. LEWIS, dissented in a separate opinion. Copies of said opinions are appended hereto. The decision and the opinion of the Court of Appeals of the State of New York is reported in 293 New York 218, — and affirms the judgment of the Supreme Court of the State of New York, Kings County, dismissing the complaint of the appellant at the end of its case. The opinion of the Supreme Court of the State of New York was written by HON. JOSEPH FENNELLY, a copy of which opinion is appended hereto.

The order and judgment of affirmance, dated December 30th, 1944, by the Court of Appeals of the State of New

York, and the remittitur were filed in the office of the clerk of the Supreme Court of the State of New York, Kings County, on February 13th, 1945. The order of the Court of Appeals of the State of New York affirming the judgment of the lower court which forms part of the remittitur contains the following words:

“Questions arising under the Constitution of the United States were presented and necessarily passed upon by this Court. The appellant contended that Chapter 93 of the Laws of the State of New York for the year 1943 violated Section 10 of Article I and Section 1 of the Fourteenth Amendment of the Constitution of the United States. This court held that the above mentioned Chapter of the Laws did not violate either of those Sections of the Constitution of the United States,—and that the legislation was valid.—”

An order was duly made by the Supreme Court of the State of New York, Kings County, on February 13th, 1945, making the order of affirmance and the judgment of the Court of Appeals of the State of New York, the order and judgment of the Supreme Court of the State of New York, the judgment having been entered in the office of the clerk of the Supreme Court, Kings County on February 26th, 1945.

The petition for appeal is presented March 7th, 1945.

The appellant, in its complaint, sued the appellees to foreclose a mortgage held by the appellant secured by property owned by the appellees. The mortgage is not in default except as to the principal amount which became due April 1st, 1924, and has not been extended. The appellant contended that the moratorium law at the time the action was commenced on March 27th, 1944, prohibiting foreclosure of its mortgage solely for default in the payment of principal, was unconstitutional and invalid. The complaint, paragraphs Tenth to Nineteenth, inclusive, contains allegations to the effect that the emergency which originally

justified the New York State Legislature in enacting the mortgage moratorium in 1933, had long since ceased to exist and that the renewal of the moratorium legislation, as embodied in Chapter 93 of the Laws of 1943 of the State of New York, is an unwarranted and unlawful impairment of the obligation on contracts, in violation of section 10, Article I, of the Constitution of the United States and a deprivation of property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States. These allegations were placed in issue by the denial of the appellees. This was the sole question presented for decision in the lower court and in the Court of Appeals of the State of New York.

The Supreme Court of the United States has jurisdiction to review the decision appealed from. In *Home Building & Loan Association v. Blaisdell* (290 U. S. 398) this jurisdiction was exercised under similar circumstances.

JOHN P. McGRATH,
Attorney for Appellant.

APPENDIX "A"

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY

Special Term—Part III

THE EAST NEW YORK SAVINGS BANK, *Plaintiff,*

against

ALVIN HAHN, HANNAH HAHN, HIS WIFE, et al., *Defendants*

The New York Law Journal—August 1st, 1944

By Mr. Justice FENNELLY

East N. Y. Sav. Bank v. Hahn—This is an action commenced by the plaintiff on March 27, 1944, to foreclose a mortgage upon real estate. The only default is as to the principal amount, which became due April 1, 1924, and has not been extended. Interest, taxes and the amortization as provided by chapter 93 of the Laws of 1943 have been paid. It is the plaintiff's contention that this latter enactment, that extended the mortgage moratorium and which covered this mortgage was invalid and unconstitutional at the time it became a law, or at any rate at the time of the commencement of this action.

If plaintiff is correct in its position, judgment of foreclosure must be granted.

The legislation attacked impairs the obligations of the mortgage contract. It can only be sustained as a proper exercise of the police power, if the emergency which originally called the mortgage moratorium into being in 1933 existed at the time of its enactment and at the time of the commencement of this action and that the emergency was a temporary one. At the time of the 1943 renewal of the moratorium legislation which extended it to July 1, 1944, the legislature made the finding that in its judgment, the public emergency of 1933 still continued and existed. It provided for an amortization of 1 per cent. (Subsequently the 1944 Legislature in again renewing for a

year the Mortgage Moratorium Law, provided for an amortization of 2 per cent.) The question of whether or not these amortization provisions to alleviate the situation of mortgagees kept pace with improvement in conditions, is not before the court and no observation will be made thereon.

While great respect must be given the legislative declaration of the continued existence of the emergency, the question of whether it still existed, is always open to judicial inquiry (*Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U. S. 398).

A careful and exhaustive preparation of this case has been made by plaintiff's counsel. It is shown that there are ample funds available for mortgage investment. As of January 1, 1944, the amount invested by savings banks in mortgages in New York State was slightly less than \$3,000,000,000, and there was available for mortgage lending within the 65 per cent of assets limit provided by law, a sum in the excess of \$1,000,000,000.

The mortgage market is, of course, inseparably connected with the real estate market. Testimony was submitted by plaintiff that can well be credited, that the real estate market in 1943 was active and gave indications of being more active in 1944. The testimony shows and it is a matter of common knowledge, that much foreclosed institutional real estate has been liquidated. For the purpose of collecting and distributing mortgage and real estate information to the savings banks supporting the service, New York State is divided into groups. Group 5 embraces Long Island and Staten Island. The chief statistician of this group prepared figures showing real estate holdings of this group that resulted from mortgage investments. The figures show that member banks in Brooklyn had an overhang of real estate as of the end of 1939 of \$49,360,469; and as of January 1, 1944, of \$17,105,680. In Queens the figures were (plaintiff's exhibit 6) at the end of 1939, \$9,808,417; and as of January 1, 1944, \$3,857,742. In Nassau the figures were at the end of 1939, \$2,487,143, and as of January 1, 1944, \$495,952. There is still to be liquidated and was at the time of the commencement of this action a considerable amount of real estate held by savings banks, insurance companies, Home Owners Loan Corporation and the trustees of

estates. Not until the holdings of these unwilling owners of real estate have been reduced so that they are no longer a factor in competition with the real estate of those who willingly acquired real estate and are willing but not forced to sell can it be said that there is a normal real estate market.'

The Legislature had the right, in its judgment, to determine that abnormal deflation of real property values, in view of these circumstances, existed at the time it enacted the renewal legislation of 1943. This was one of the reasons upon which the original moratorium legislation of 1933 was based. The emergency, in the court's opinion, still existed at the time this action was commenced.

Plaintiff's counsel advances the argument that no alleged emergency of eleven years' duration can be considered temporary. But time is relative. The conditions which created the emergency are righting themselves. The testimony of the statistician for Group 5 shows that in this area from 1933 to 1938 foreclosures exceeded new loans and that from then on the reverse was the case. Liquidation of institutional properties has been steadily going on. The time can reasonably be foreseen when they will no longer be a competitive factor in the real estate market.

The motion made by defendant at the end of plaintiff's case to dismiss the complaint, upon which decision was reserved, is granted, with an exception to plaintiff. Submit judgment upon two days' notice of settlement.

Pleadings and exhibits may be had from the clerk.

APPENDIX "B"

373—NEW YORK OPINION—(Vol. 293)—218

EAST NEW YORK SAVINGS BANK, *Appellant*ALVIN HAHN, et al., Respondents, et al., *Defendants*

Decided December 30, 1944

Appeal, on constitutional grounds, from a final judgment of the Supreme Court, Kings County, in favor of defendants, entered August 18, 1944, upon a dismissal of the complaint by the court on a trial at Special Term (Fennelly, J.) at the close of the plaintiff's case upon the ground that plaintiff had failed to establish that chapter 93 of the Laws of 1943 (mortgage moratorium extension) was invalid and unconstitutional at the time it became a law or at the time of the commencement of the action.

John P. McGrath, Charles H. Heinlein and John J. Buckley for appellant.

George R. Fearon for Savings Banks Association of the State of New York, amicus curiae, in support of appellant's position.

No appearance for respondents.

Nathaniel L. Goldstein, Attorney-General (Orrin G. Judd and Herbert A. Einhorn of counsel), appearing pursuant to section 68 of the Executive Law.

I. Nathanson, George A. Roland and Seymour C. Simon, for Slocum Realty Corporation, amicus curiae.

LEHMAN, Ch. J.: The legislative declaration in Chapter 793 of the Laws of 1933 that "serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the State and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists" did not "create" a legislative power to suspend or change legal remedies of holders of

bonds and mortgages. The existence of conditions "affecting and threatening the welfare, comfort and safety of the people of the state" may, however, furnish the occasion for the exercise of such power. (*Home Building & Loan Association v. Blaisdell*, 290 U. S. 398; *Matter of People (Title & Mortgage Guarantee Co.)*, 264 N. Y. 69, 94.) Concededly the existence of extraordinary conditions in 1933 as set forth in this legislative declaration and as confirmed by common knowledge, justified the extraordinary remedy that till July 1, 1934, no action should be brought to foreclose a mortgage for a default in the payment of principal. (*Klinke v. Samuels*, 264 N. Y. 144.) Each year thereafter the Legislature on similar findings decreed that the remedy provided in 1933 should remain in force for another year.

In 1943 the Legislature again declared that "The serious public emergency which existed at the time of the enactment of . . . chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three . . . having continued, in the judgment of the Legislature, to the present time and still existing, the provisions of such chapters seven hundred and ninety-three of the laws of nineteen hundred thirty-three . . . shall . . . remain and be in full force and effect until July first, nineteen hundred forty-four . . .," (L. 1943, Ch. 93). The Legislature at the same time provided that an owner of mortgaged premises should not be entitled to claim the benefit of the suspension of the right to foreclose the mortgage unless he amortized the principal at the rate of one per cent per annum. The plaintiff challenges the finding of the Legislature that the "serious public emergency" which existed in 1933 still existed in 1943, and urges that the exercise of the power of the Legislature to provide an extraordinary remedy for extraordinary conditions which was justified in 1933 may not be invoked in 1943 when the abnormal conditions of an earlier time have disappeared.

The Legislature has the responsibility of determining when extraordinary conditions exist "threatening the welfare, comfort and safety of the people of the state". Within the limits of its powers as defined by the Constitution of the State and as limited by the Constitution of the United States, choice of the appropriate remedy for such

conditions is then vested in the Legislature. When the legislative choice of a remedy is challenged on the ground that it transcends the limits placed by the Constitution of the State or the Constitution of the United States upon the power of the Legislature and that it impairs the obligation of a contract or deprives a person of his property without due process of law, the legislative finding that a threatening public emergency exists is not conclusive. Judicial inquiry is not precluded whether the remedy chosen is within the power of a State Legislature "construed in harmony with the constitutional limitation on that power." (*Matter of People (Tit. & Mtge. Guar. Co.)*, 264 N. Y. 69, 284) but upon such an inquiry the legislative findings are entitled to great weight and the legislative remedy will not be stricken down unless its invalidity is clearly established.

An extraordinary remedy which is appropriate and legitimate in an exigency resulting from abnormal conditions may be inappropriate and beyond the limits of the power of a State if temporary impairment of the obligation of a contract is continued after the exigency has passed. (*Block v. Hirsh*, 256 U. S. 135, 157.) When this court sustained the validity of limitation upon the remedies of the holder of a bond and mortgage created by chapter 793 of the Laws of 1933, we said that "such legislation, reasonably seeking only temporary relief, is not unconstitutional". (*Klinke v. Samuels*, *supra*; italics are new.) "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." (*Home Bldg. & L. Assn. v. Blaisdell*, *supra*, P. 442)

Doubtless such a judicial inquiry would disclose that many—perhaps all—of the adverse conditions created by the "abnormal disruption in economic processes" which, as the Legislature found, existed in 1933 and resulted in a "public emergency", disappeared before 1943. The Legislature did not, in 1943, find that these conditions still existed. It found only that the "serious public emergency" existing in 1933 and "*resulting*" from these conditions, still existed. In 1943 the fact that payrolls and savings bank deposits had increased in almost unprecedented degree was a matter of common knowledge. The Legislature could not ignore the great changes in the economic situation.

On the other hand, an accumulation of past due mortgages resulting from the ten-year-old ban upon actions to foreclose mortgages for default in the payment of principal might reasonably cause apprehension that a flood of foreclosure actions would follow removal of the ban and might itself justify a statute reasonably calculated to stem the impending flood. Reports which legislative committees made to the Legislature in 1938 and 1943 as well as a message of the Governor called to the attention of the Legislature also the fact that abnormal conditions incident to a war economy or resulting from other causes might still constitute a threat "to the welfare, comfort and safety of the people of the state" and might call for the exercise of the legislative power to provide an extraordinary remedy for extraordinary conditions.

The presumption is that the Legislature "inquired and found" that under the conditions then disclosed there was need for a continuance of the suspension of the right of holders of bonds and mortgages to foreclose for default in the payment of the principal. (*Szold v. Outlet Embroidery Supply Co.*, 274 N. Y. 271, 278.) It is entirely unimportant whether the conditions then existing have created a new emergency, as said by the Governor in his message, or have, as the Legislature said, resulted in the continuance of an emergency itself created by conditions which have run their course. The question which the court must decide is whether the Legislature in the challenged statute has provided an appropriate remedy to tide over an exigency resulting from present conditions. We have said in an analogous case that: "Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the exercise of the reserved power of the state and whether the remedy adopted by the state is reasonable and legitimate." (*Matter of People (Tit. & Mtge. Guar. Co.)*, supra, P. 94) We conclude that the challenged statute meets that test.

The judgment should be affirmed with costs.

LEWIS, J. (dissenting): In this action to foreclose a mortgage on real property a challenge by a mortgagee to the constitutionality of the 1943 Mortgage Moratorium Law

(L. 1943, ch. 93) has been denied at Special Term. The defendants-mortgagors, who offered no proof in opposition to the plaintiff's case, have been awarded a judgment dismissing the complaint upon the ground that the evidence presented by the plaintiff-mortgagee failed to establish a cause of action.

Coming to us by direct appeal on constitutional grounds (Civ. Prac. Act S. 588 subd. 4) the case presents the question, whether the undisputed facts of record afford a valid basis for the legislative finding upon which the challenged statute rests, viz., that the public emergency, which existed in 1933—at the time of the enactment of section 1077-a of the Civil Practice Act (L. 1933, ch. 793)—continued and still constituted a public emergency on March 11, 1943, when chapter 93 of the Laws of 1943 became a law.

By the 1933 Mortgage Moratorium Law (L. 1933, ch. 793) the Legislature declared “ . . . that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of income by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity of legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred and thirty-four, is hereby declared as a matter of legislative determination”. Then follow the moratory provisions which, during the emergency thus declared, suspended the maintenance of certain foreclosure actions and related actions there defined.

Thereafter, in each of the ten succeeding years (except in one instance where the extension was for two years (L. 1941, ch. 782, S. 1) the Legislature extended for a single year the moratory provisions of the 1933 Act, each renewal being based upon a finding that the serious public emergency declared to exist in 1933 had “continued” and was “still existing.”

We come then to the statute here called into question (L. 1943, ch. 93) as to which it is important to note, as in

the nine preceding similar laws, the public emergency assigned as the reason for the mortgage moratorium legislation was not some new or different form of abnormality in "economic and financial processes" affecting public welfare within the State. The reason for each succeeding enactment was the same and is typically expressed in the legislative finding within section 1 of chapter 93 of the Laws of 1943 with which we are now concerned and which provides in part: "Section 1. The serious public emergency, which existed at the time of the enactment of Section VJ77-a . . . of the Civil Practice Act as added by Chapter 793 of the Laws of 1933 . . . having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters . . . shall, notwithstanding any provision of such chapter, remain in full force and effect until July 1, 1944 . . ." (Emphasis supplied)

Although we hold in proper respect the declaration by the Legislature that the same public emergency which called forth moratorium legislation in 1933 still existed in 1943, that declaration is not conclusive. "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." (*Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 422.) "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." (*Chastleton Corp. v. Sinclair* (per: Holmes, J.), 264 U. S. 543, 547-8.) In a prior case which dealt with emergency legislation the same jurist had written—"A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." (*Block v. Hirsh*, 256 U. S. 135, 157; see, also, *Klinke v. Samuels*, 264 N. Y. 144, 149; *Matter of People* (Title & Mtg. Guar. Co.), 264 N. Y. 69, 95-6.

Here the basis of the appellant's challenge to the 1943 Moratorium Law is the clause of the Federal Constitution (art. 1, S. 10) which forbids enactment by a State of a law impairing a contract obligation. It is not denied that in the public emergency which concededly existed in 1933 the moratorium legislation of that year was a valid exercise of

the State's essential reserved power and that the temporary suspension of foreclosure rights possessed by mortgagees was then opposite to emergency relief. "The economic interests of the State may⁶ justify the exercise of its continuing and dominant protective power notwithstanding in interference with contracts. . . . 'the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power . . . is paramount to any rights under contracts between individuals.' " (Hughes, Ch. J., writing in *Home Bldg. & Loan Assn. v. Blaisdell*, supra, pp. 437, 439.) Accepting that rule as a statement of an appropriate and necessary principle of government, the appellant asserts that the exigency which fully warranted the enactment of the Moratorium Law of 1933 did not continue into the tenth year thereafter to afford a legal basis for the enactment of the 1943 statute. The appellant's submission is that the invalidity of chapter 93 of the laws of 1943 is established by the record before us which is said to contain undisputed proof that the emergency of 1933 which concededly warranted the temporary suspension of the exercise by the appellant of its contract rights as a mortgagee, has not "continued" and was not "still existing" in 1943 when the Moratorium Law here in question became effective. If so, the judgment before us for review must be reversed. I pass to a consideration of the evidence.

Among the economic factors existing in 1933 which the Legislature found warranted the moratorium legislation of that year, was "the curtailment of incomes by unemployment." As to that factor the present record shows that between 1933 and 1943 there was in the State of New York an increase of 92½% in the number of wage earners employed and an increase of 266% in weekly pay rolls. In 1933 the average weekly earnings of employees was \$21.90; in 1943 that average had increased 103.7% to \$44.68. In 1933 the actual number of workers employed in manufacturing was 323,071; in 1943 that number had increased to 735,265.

Other exigent factors found and declared by the Legislature to exist in 1933 were an "abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state" The fact is within our judicial knowledge that the banks of the nation had been closed by a Federal Executive Order in 1933. In that year the Superintendent of Banks reported a shortage of currency in the State. At the close of that year his report stated—"Attention was at once centered upon plans for the issuance of scrip. And on March 6, 1933, the Governor asked the Legislature for an act authorizing the creation of a State-wide corporation to serve this purpose. Such a bill was passed immediately and the plans for the issuance of scrip against bank deposits moved swiftly forward and were not abandoned until it was definitely known that the National Government was prepared to offer a solution." That report speaks of conditions at or about the time of the "bank holiday" of 1933, nearly six months prior to the enactment of the 1933 Moratorium Law. The record shows however—on the question of improvement in general financial conditions within the State—that on December 31, 1935, the amount of demand and time deposits in all banks—in both commercial and savings banks—aggregated 13.2 billion dollars; on June 30, 1943, the total of those types of deposits had increased to 25.7 billion dollars, an increase of 95% and a maximum for all time. In 1933 the savings banks of the State lost 7.54% of their deposits; in 1943 the savings banks gained 8.57%. In 1933 savings bank depositors withdrew \$392,000,000 more than they deposited; in 1943 the same type of depositors placed in savings banks five hundred million dollars more than they withdrew. In 1933 the total amount of money in the nation was \$45.49 per capita; in February, 1944 the amount of money in circulation was \$151.22 per capita—an increase of more than three times the per capita figure of 1933. In 1933 the aggregate amount of money in circulation in the nation was \$5,720,764,000; on February 29, 1944 that aggregate figure had increased to \$20,823,568,000.

The Moratorium Law of 1933 also mentions as a factor prompting the legislation of that year the existence

of an "abnormal deflation of real property values." Upon that subject the evidence is that between 1933 and 1944 there was a sharp decline in housing vacancies in the six largest cities of the State. It also appears that in those six cities for the year 1933 the average tax delinquency was 17.3% of the total taxes levied; in 1942 that average was 4.8%. There is evidence that on January 1, 1944 the savings banks of the State had available for new investment in real estate mortgages under section 235, paragraph 6 (d) of the Banking Law a sum in excess of one billion dollars. There is also the significant item of evidence that in 1943 the savings banks loaned on mortgages covering property outside the State—in Pennsylvania, New Jersey and Connecticut—approximately one hundred million dollars. Upon the same subject there is also testimony by experts that in the metropolitan area of New York City there was an active real estate market in 1943 and that in that year money was readily available to refinance mortgages on buildings constructed prior to 1931.

The Moratorium Law of 1943, like the nine similar statutes which preceded it, was temporary in operation. It was limited to the exigency which called it forth and which the Legislature expressly declared to be the emergency of 1933, "continued" and "still existing" in 1943. The operation of the Moratorium Law of 1943 could not validly outlast the emergency which prompted its enactment. It could not be so extended as to suspend the contract rights of the appellant mortgagee beyond that emergency. (See *Home Bldg. & Loan Assn. v. Blaisdell*, supra, p. 447.) The undisputed evidence to which reference has been made leads me to conclude that the emergency which caused the enactment of the Moratorium Law of 1933 was not "still existing" on March 11, 1943, when chapter 93 of the Laws of 1943 became a law. To adjudicate otherwise upon the evidence before us would be in disharmony with the constitutional limitation which the appellant rightly invokes. "Necessarily the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined; and must be discharged in accordance with

the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question." (Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 554.)

Accordingly I dissent and vote for reversal and the direction of judgment of foreclosure and sale in favor of the plaintiff.

Lehman, Ch. J., Loughran, Rippey, Conway, Desmond and Thacher, J. J., concur with Lehman, Ch. J., Lewis, J., dissents in opinion.

Judgment affirmed.

(8009)

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CHARLES ELMORE DROPLEY
CLERK

Supreme Court of the United States

OCTOBER 1944 TERM

No.

1174

62

THE EAST NEW YORK SAVINGS BANK,

Appellant,

against

ALVIN HAHN and HANNAH HAHN, his wife,

Appellees.

BRIEF OF APPELLANT

JOHN P. McGRATH,
Counsel for Appellant.

JOHN P. McGRATH,
JOHN J. BUCKLEY,
CHARLES H. HEINLEIN,
on the brief.

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Supreme Court of the United States

OCTOBER 1944 TERM

No. _____

THE EAST NEW YORK SAVINGS BANK,
Appellant,
against

ALVIN HAHN and HANNAH HAHN, his wife,
Appellees.

BRIEF OF APPELLANT

Statement

The only question involved on this appeal is the validity of Chapter 93 of the Laws of 1943 of the State of New York, under the Constitution of the United States, Article 1, Section 10, and 14th Amendment, Section 1. The action was brought in the Supreme Court of the State of New York, Kings County, for a judgment declaring Chapter 93 of the Laws of 1943 to be invalid as an unconstitutional impairment of plaintiff's contractual rights, and granting foreclosure and sale of plaintiff's mortgage. The complaint was dismissed at the close of plaintiff's case (182 Misc. 863, 51 N. Y. Supp. [2d] 496), and from the judgment entered thereon plaintiff appealed direct to the Court of Appeals of the State of New York (N. Y. Civ. Prac. Act, Sec. 588, subd. 4). That court affirmed the judgment dismissing plaintiff's complaint, holding Chapter 93 of the Laws of 1943 to be a valid exercise of the reserved power of the State and not in conflict with the Federal Constitution (293 N. Y. 622).

This appeal is taken to this Court as of right (28 U. S. C. A., Sec. 344 [Judicial Code, Sec. 237], as amended).

Nature of Action

This action is brought to foreclose a mortgage. The bond and mortgage were in the original sum of \$5,000 and there is due \$4,912.50 with interest from April 1, 1944.

The mortgage is not in default except as to the principal amount which became due April 1, 1924, and has not been extended. If there was a valid mortgage moratorium existing in the State of New York when the action was commenced on March 27, 1944, the mortgage under foreclosure is covered by it. Plaintiff contends that the moratorium law in existence at the time this action was commenced is unconstitutional and invalid. The complaint (fols. 26-39, pars. Tenth to Nineteenth) contains allegations to the effect that the emergency which originally justified the Legislature in enacting the mortgage moratorium in 1933 has long since ceased to exist and that the renewal of the moratorium legislation, as embodied in Chapter 93 of the Laws of 1943, is an unwarranted and unlawful impairment of the obligation of contracts in violation of the Federal Constitution. These allegations have been placed in issue by the denial of the defendants (fols. 46-47).

Status of the Case

The trial court dismissed the complaint at the close of the plaintiff's case. By so doing the court found that the plaintiff's proof was legally insufficient. The facts proved by the plaintiff were not controverted and it is clear from the opinion both at Special Term and in the Court of Appeals, that these facts were accepted as true. As the case now stands, the facts adduced by the plaintiff are undisputed and there is squarely presented the question whether, in the light of these facts, any public emergency now exists justifying this moratorium law which denies (warranting the denial) to a mortgagee the right of foreclosure when his debt is past due and unpaid.

Jurisdiction of This Court

The plaintiff-appellant, having duly drawn into question the validity of Chapter 93 of the Laws of 1943 of the State of New York on the ground that the statute is repugnant to the contract and due process clauses of the Federal Constitution (Art. I, Sec. 10; 14th Amendment, Sec. 1) and the Court of Appeals of the State of New York (the highest court in the State in which a judgment could be had) having decided in favor of the validity of the statute, appeals to this Court as a matter of right (28 U. S. C. A. 344-a).

The appellant has complied with Rule 12 of this Court in filing a statement supporting the jurisdiction of this Court.

The Attorney General of the State of New York has filed a statement opposing the jurisdiction of this Court and has moved to dismiss or affirm.

The Attorney General, admitting that the contract and due process clauses had been duly invoked below, asserts that the appellant's contentions are so unsubstantial as not to need argument before this Court and bases his argument on certain alleged findings of fact drawn from the opinions of the courts below which he states are matters within judicial knowledge and that this Court need not accept jurisdiction to review them further.

The appellant submits that such findings, as may be drawn from the opinions of the courts below, support the appellant's contentions that conditions to which Chapter 93 of the Laws of 1943 are addressed did not exist either at the time of passage of the Act or at the time of the commencement of this action, and that the statute is unconstitutional. The appellant's position is that the conclusions reached result from an erroneous application of the law to the facts and that such is made manifest by the development of the argument herein.

The Legislative Findings

When the original moratorium statute was passed on August 26, 1933, by Chapter 793 of the Laws of 1933, the Legislature declared the existence of a public emergency in the following language:

"SECTION 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity of legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred and thirty-four, is hereby declared as a matter of legislative determination."

The original statute has been renewed annually for ten years except in one instance where the extension was for two years (Laws of 1941, Chap. 782, Sec. 1). On the occasion of each renewal it has been the practice of the Legislature to make a finding that in its judgment the serious public emergency, as declared to exist in 1933, continues and still exists at the time of each legislative renewal. The statute which is called into question in this suit is Chapter 93 of the Laws of 1943. Section 1 of said chapter reads in part as follows:

"SECTION 1. The serious public emergency, which existed at the time of the enactment of Section 1077-a * * * of the Civil Practice Act as added by Chapter 793 of the Laws of 1933 * * * having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters * * * shall, notwithstanding any provision of such chapter, remain in full force and effect until July 1, 1944. * * *"

When the Legislature made the above quoted finding that the serious public emergency continues and still exists, it did so without any formal inquiry or investigation on its part as a whole, or on its behalf by any legislative committee or otherwise. For aught that appears in the legislative records for the 1943 session, the Legislature either made that finding without any proof at all before it, other than the individual opinions of its respective members, or it relied upon the report which was made to it the previous year by its joint legislative committee on mortgage moratorium and deficiency judgments, which committee made a report to the Legislature on February 24, 1942, which is known as "Legislative Document (1942) #45". This report known as the "Janes Committee Report" was the result of the latest investigation by the Legislature prior to the commencement of this action, on the question whether the "serious public emergency" exists or had ceased to exist.

This report should be considered by the court as part of the record in this case. It contains certain findings, all of which tend to establish that the public emergency no longer existed at the time that the report was made, notwithstanding the bare statement that the emergency still exists. We refer to certain of the findings contained on page 5 of this report for the purpose of showing that, if the legislative finding that the serious public emergency still exists is predicated upon the findings of the Janes Committee, such finding cannot be sustained (fols. 89-94).

Finding #1:

"That the emergency still exists and that the sudden termination of the moratorium would of itself now create an emergency. Improved business and economic conditions resulting from the defense program and the war have largely been offset by the increase in living costs and the numerous and ever-increasing tax burdens. The average home owner has received no relief from the burden of real estate taxes, and, on the contrary, such taxes have increased since the

first adoption of the moratorium. Any present sudden termination of the moratorium might result in a very large amount of forced liquidation of mortgage indebtedness resulting in loss alike to property owners, mortgagees, depositors and others."

The first sentence of this finding is a contradiction. It states that the emergency still exists but such emergency does not seem to concern the committee nearly so much as a possible new emergency which they fear the restoration of contractual rights of mortgagees might precipitate. The finding admits that business and economic conditions have improved but seeks to offset against this improvement the increase in living costs and taxes.

The testimony of Dr. Bussing (fols. 125-136) shows that in February, 1944, living costs were but 24% above normal although there had been a far greater increase in payrolls, employment, number of persons employed per family, etc. In weighing the value of this finding, it should be remembered that the serious public emergency of 1933 resulted from "abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal reflation of real property values and the curtailment of incomes by unemployment and other adverse conditions". This finding does not assert that any of these conditions still continues. On the contrary it recognizes that business and economic conditions have improved.

Finding #2:

"Conditions generally in real estate have improved and the curtailment of building during the war seems likely to further increase values. That some permanent solution of the moratorium problem should now be made before we pass from the period of war stimulated business activity into a possible period of serious post war depression."

In this finding we have a surprisingly frank statement of the legislative approach. The committee recognizes that

"the abnormal deflation of real property values" existing in 1933 had disappeared by 1942, but the committee was thinking of the moratorium as a legislative problem, a matter which apparently involved other considerations than the mere question whether the serious public emergency of 1933 existed in 1942 or not. Obviously the committee was thinking in terms of expediency, but it recognized that the 1933 emergency had passed and that it was imperative for the Legislature to do something while we are in the prosperous phase of the economic cycle before a genuine emergency again comes upon us.

The remaining six findings (fols. 92-94) contained in this report do not address themselves at all to the question whether the serious public emergency still exists. Finding #3 merely states that interest on moratorium mortgages should not exceed 5%; finding #4 states that when the interest rate is reduced to 5% or lower, then property owners should amortize; finding #5 provides that property owners unable to pay amortization, should be allowed a reasonable time to sell or refinance before foreclosure; finding #6 states that in suits on bonds for interest or advances, a setoff of the fair and reasonable market value of the property should be permitted; finding #7 states that the present law relating to deficiency judgments is satisfactory, and the committee then concludes, as its eighth finding, "that when the moratorium mortgages have been placed on an amortization basis, there will no longer be danger of extensive liquidation on the termination of the moratorium, and the same should then be terminated."

It is clear that findings 3, 4 and 5 are merely a legislative attempt to re-write the mortgage contract. Finding #8 expresses the opinion that once mortgages are amortized the moratorium can be terminated without hardship. If this conclusion is correct, then the moratorium should have been terminated in 1942, for we have shown that the vast majority of mortgages held by savings banks in Brooklyn and Queens were on an amortized basis in 1942 and still are (see Plaintiff's Exhibit 11, p. 146). This exhibit

shows that of loans made prior to 1935 held by savings banks in Brooklyn only 31.3% were non-amortizing. Of this 31.3%, 9.6% represented loans amounting to 66⅔% or less of the appraised value which could be readily refinanced (N. Y. Banking Law, Sec. 235, subd. 6, fols. 207-211, 305-318), so that only 21.7% represented unamortized loans where the loan exceeded two-thirds of the appraised value of the property. In Queens the figures are even more indicative that the fear of disaster, should the moratorium be terminated, is unfounded. In Queens 34.9% of mortgages held by savings banks are unamortized, but 17.6% of these mortgages are on properties where the amount of the mortgage is 66⅔% or less of the appraised value, leaving but 17.3% of mortgages where the amount exceeds two-thirds of the appraised value of the property (Plaintiff's Exhibit 11).

It is impossible to read the report of the Janes Committee without concluding that the "serious public emergency" no longer exists. The committee recognized the fact that real estate values passed the normal level in 1940 and by December, 1941, real estate was nearly 20% above normal (fols. 83-85). The committee also foresaw clearly the stimulus to older residential properties which the war would bring. It states at page 27 (fol. 86):

"It may well be that the next few years will see a substantial increase in the value and marketability of these older properties. It is this class of property which, to a large extent, is covered by the mortgages which are now within the protection of the moratorium laws."

We have established on the trial that this increase in value has come to pass and that such real estate is now commanding prices in excess of normal. This is a reality which is incompatible with the alleged continued existence of the "serious public emergency" of 1933.

The Testimony

Dr. Irvin Bussing, the head of the Research and Statistical Department of the Savings Banks Trust Company, assembled certain figures contrasting present economic conditions with those in 1933 when a serious public emergency admittedly obtained. These figures are summarized as follows:

FINANCIAL: Demand and time bank deposits in New York State increased 95% from December 31, 1935 to June 30, 1943 (fols. 111-112).

During the year 1933 the savings banks lost \$392,000,000, or 7.54% of their deposits. In 1943 savings banks gained \$500,000,000, or 8.57% of their deposits (fols. 113-115).

Bank deposits in New York State as of June 30, 1943, amounted to 25.7 billion dollars, which is the highest amount in the entire history of the State (fols. 117-118).

Money in circulation in the United States in 1933 amounted to \$45.49 per capita. In February, 1944, it amounted to \$151.22 per capita (fols. 120-121). New York State war bond (Series E) purchases by individuals is proportionately greater than that in the country as a whole. During 1942 individual purchases of war bonds (Series E) in New York State were \$49 per capita, whereas in the country at large they were but \$28 per capita (fols. 121-123).

In 1943, New York State individual purchases were \$81 per capita to \$65.10 per capita in the entire country. This trend has continued in 1944 (fols. 124-125).

EMPLOYMENT: The number of wage earners in New York State has increased 92½% between 1933 and 1943 (fols. 126, 131-133).

Weekly payrolls of manufacturing enterprises in New York State have increased 266% between 1933 and 1943. Average weekly earnings of workers have increased from

\$21.99 in 1933, to \$44.68 in 1943, an increase of 103.7% (fols. 127, 128, 131-133).

Moreover, the additional employment has resulted in a substantial increase in the number of individuals per family presently employed (fol. 129).

DEPARTMENT STORE SALES: Department store sales increased from 86% of normal in 1933 to 134% of normal in 1943 (the normal period being the period from 1935 to 1939) (fols. 129-131).

COST OF LIVING: The cost of living in the City of New York has increased 25.1% from 1935 to 1944. The figures throughout the entire State are substantially the same (fols. 131, 133-136).

AVAILABILITY OF MORTGAGE MONEY: As of January 1, 1944, in New York State the amount invested by savings banks in mortgages was slightly less than three billion dollars. These banks had available for mortgage lending, within the 65% limit provided by law (Banking Law of the State of New York, Sec. 235, subd. 6), a sum in excess of one billion dollars. As evidence of the difficulty encountered by savings banks in investing these available funds in mortgages, Dr. Bussing pointed out that during 1943 savings banks have taken over one hundred million dollars in mortgages in the adjoining states of Pennsylvania, New Jersey and Connecticut, and have paid premiums on these loans in order to get their money invested (fols. 142-154).

Charles Punia, a real estate broker of twenty-four years' experience, who had personally arranged for the refinancing of mortgages with lending institutions in an amount exceeding \$8,000,000 during the past year, testified of his personal knowledge to the fact that residential real property mortgages can be refinanced today at 66 $\frac{2}{3}$ % of the sound normal market value of the property if the location and physical condition of the property is satisfactory

(fols. 207-211). He also testified that one- and two-family houses are scarce; that they are bringing good prices and that such prices represent the fair, sound intrinsic value of the properties (fols. 209-211).

Albert Hitchcock, Chief Statistician of the Mortgage Information Bureau of the savings banks in group five, presented to the court certain statistics which we will deal with fully under the heading "Exhibits" (fols. 240-275).

Herbert E. Bode, a real estate broker and president of the Long Island Real Estate Board, testified as to his personal knowledge of prevailing conditions in the real estate and mortgage market. His organization sold about \$3,000,000 worth of real estate in 1943 of which \$1,000,000 consisted of one-family houses primarily in the Queens area. He testified that the real estate market was very active in 1943 and that it would be more active in 1944 if the houses were available, but houses are getting scarce. Such houses as are sold bring prices that represent at least the fair, sound intrinsic value of the property. Mortgage loans are readily available on one- and two-family houses at 60 to 66 $\frac{2}{3}$ % of the prices which such buildings can be sold for today and savings and loan associations are lending up to 80% of the sales price. Mr. Bode's firm in the years subsequent to 1933 had been engaged quite extensively in the management of real estate and its management business has decreased substantially in the last two and a half years because of the increased sales of this property (fols. 305-318).

The Exhibits

Exhibits 1 and 2 are the bond and mortgage.

Exhibit 3 (p. 135) is an article from the New York Times relating to a report sent by the New York City Tax Collector to the City Treasurer showing that 91.1% of real estate taxes for the year 1943-44 had been paid by April 30th (the last day to pay without penalty) and the City

Collector predicted that 94 or 95% of the current taxes would be paid before June 30th. The report stated:

"Continued improvement in employment with a consequent demand for bigger and better apartments, increases in earnings of families as well as the number of those in the family working, and tremendous increases in business, have all had their effect in improving tax conditions."

Exhibits 4 to 11 relate to statistics compiled by Group 5 Savings Banks Mortgage Information Bureau and were the subject of Mr. Hitchcock's testimony. They show the following:

Exhibit 4 (p. 139) shows that Brooklyn savings banks had available for investment in mortgages, on January 1, 1944, the sum of \$454,000,000 and all Group 5 savings banks in Brooklyn, Queens and Nassau had available for mortgage investment on January 1, 1944, the sum of \$542,000,000.—It should be pointed out in connection with this exhibit that Manhattan savings banks also have large sums of money available for mortgage investment in Brooklyn and Long Island.

Exhibit 5 (p. 140) is a listing of all real estate held by Group 5 savings banks in Brooklyn, Queens and Nassau on January 1, 1944. It shows that the holdings of one- and two-family houses by these savings banks were as follows:

	No.	1 Family	2 Family
Brooklyn	120	\$668,107	
	147		\$750,189
Queens	119	749,399	
	35		198,063
Nassau	32	266,000	
	2		11,000

Having in mind that the moratorium is primarily designed to protect the home owner, that is, the owner of a one- or two-family house, it is clear that the overhang of

foreclosed institutional real estate at the present time is inconsequential, thereby confirming that real estate can be readily sold today at fair prices.

Exhibit 6 (p. 141) contains a compilation by years from 1934 to 1943, of real estate held, foreclosures, sales and new loans of Group 5 savings banks. This exhibit shows that the real estate held by savings banks has been constantly declining; that foreclosures have been constantly declining; that real estate sales activity has been greater in recent years in proportion to the amount of real estate held and that new mortgage loans were greatly on the increase up to 1941 when building construction was necessarily curtailed as a result of the war effort.

Exhibit 7 (p. 142) shows the contrast between the condition of arrears on mortgages held by Group 5 savings banks from October 1935 to October 1943. It shows that in October 1935 19% of the mortgages, aggregating 25% of the dollar amount, were in arrears and that this figure has constantly declined until in October 1943 there were in arrears but 2.2% of the mortgages aggregating dollar amount of but 3%.

Exhibit 8 (p. 142) shows figures relating to occupancy of six-story apartment houses constructed in Brooklyn since 1934. The number of vacancies in these buildings has decreased from 7% in 1938 to .07% in 1943.

Exhibits 9 and 10 (pp. 142-144) are charts prepared in 1942 covering Brooklyn and Queens. These charts show the amount of savings bank mortgages being amortized in 1942 and those not on an amortized basis at that time.

Exhibit 11 (p. 146) is an elucidation of the charts found in Exhibits 9 and 10. The figures in Exhibit 11 are illuminating because they show that in spite of the moratorium, economic conditions generally, and real estate conditions in particular, have been sufficiently favorable to enable the savings banks, despite this adverse legislation, to place about two-thirds of their mortgages, made prior to 1935, on an amortized basis at rates of amortization in excess of the statutory 1%. These figures conclusively demon-

strate that the legislative apprehension that an abrupt termination of the mortgage moratorium law would result in extensive liquidation and perhaps bring on another emergency is rank speculation wholly unsupported by the realities.

Exhibits 12 to 19 are figures taken from the brief of the Mayor of the City of New York in opposition to the efforts of the Metropolitan Fair Rent Committee to secure O.P.A. approval of a general 10% rent increase over rentals prevailing on March 1, 1943. Each exhibit shows the source of the figures contained therein.

Exhibit 12 (p. 148) is a vacancy survey of competitive apartments in Manhattan. It shows that as of February 15, 1944, the vacancies in apartment houses, nine stories and over, were but 1%; the vacancies in six-story elevator apartments were 0.5% and the vacancies in walk-up apartments were but 0.8%. These figures are indicative of the serious housing shortage which tends to make residential dwellings encumbered by moratorium mortgages more valuable at this time.

Exhibit 13 (pp. 149-152) is a survey of vacancies in old law tenements as of April 1, 1944. This shows that there are 8% vacancies in this type of building but the exhibit points out that many of these vacancies exist because the buildings are unfit for human habitation. There is also attached to this exhibit a list showing the number of buildings and apartments in the various boroughs of New York City which are unfit for human habitation.

Exhibit 14 (p. 153) shows the extent of delinquencies in New York City real estate taxes from 1924 to 1942-43. The percentage of delinquencies has decreased from a high of 26.46% in 1932 to a low of 7.76% as of June 30, 1943. The latter percentage is lower than the normal years of 1924 and 1925, and the boom years of 1928 and 1929. As indicated by Exhibit 3, the percentage of delinquencies will be down to but 5% or 6% for the year ending June 30, 1944.

Exhibit 15 (p. 154) gives a survey of vacancies in competitive apartments in Manhattan, not including old law tenements, for the years from 1924 to 1944, and shows that these vacancies of less than 1% are at the low point for the entire twenty-year period.

Exhibit 16 (pp. 155-157) is a listing of 100 examples of Manhattan foreclosures during 1943 where the amount due on the mortgages exceeded the assessed value.

Exhibit 17 (pp. 157-159) is a similar listing of 100 instances where deeds were surrendered in lieu of foreclosure where the amounts due on the mortgages exceeded the assessed value.

It is common knowledge that real estate in the City of New York in the past several years has not been under-assessed. In most instances the assessed valuation has equalled or exceeded the fair market value of the property. These exhibits, therefore, shed a great deal of light upon the conditions which the moratorium legislation is actually being used to protect. It requires no argument that a property owner who has no real equity in his property should not be perpetuated in his ownership by moratorium legislation with the concomitant deprivation of the right of the mortgagee to acquire the property and thereby salvage as much as he can from his mortgage investment. We believe that the facts set forth in the record, bearing upon economic conditions generally and real estate conditions in particular, amply demonstrate that if a property owner has kept his property in good condition and has any real equity in it, the time is propitious for him to arrange refinancing and perform his obligations to the mortgagee. If a property owner is unable to do so at this time it must be because he has no equity to protect, and if such is the case the mortgagee should not be deprived of his remedies.

Exhibit 18 (p. 160) contains a table showing the basic New York City real estate tax rates from the years 1939-40 to 1944-45, indicating that taxes during the coming year will be lower than at any time since 1939.

Exhibit 19 (pp. 160-161) is a published article referring to 47 mortgages on six-story elevator apartments built between 1935 and 1938 which were refinanced in 1943 at a 7% increase in principal and at a decrease of from 4.80% to 4.22% in interest rate. This emphasizes the trend toward easier credit on better terms.

Present Conditions

We state without hesitation that if the case were to be tried today, the proof would show that there has been continued and progressively greater improvement in economic conditions with respect to each of the factors dealt with in the testimony and exhibits.

Developments of Contemporary History

Appellant's position is that if it can establish to the satisfaction of the court that there presently exists no serious public emergency resulting from "the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment", the justification for moratorium legislation has disappeared and Chapter 93 of the Laws of 1943 must be declared invalid. Developments of contemporary history overwhelmingly establish that there has been a complete reversal of the desperate economic circumstances which required the original enactment of the moratorium law; that today we are living in an era of economic prosperity with all financial institutions in a healthy condition, with ample credit available to everyone and with every agency of the federal government bending its efforts to bring about a liquidation of existing obligations as one means of checking the sharply rising inflationary trend which is in serious danger of getting out of control (fols. 338-362).

We, therefore, now make reference to certain matters which we ask the court to judicially notice as evidence of the reversal of circumstances which indicate that today, if any emergency exists at all, it is an emergency arising from the fact that people generally have too much money, too little goods to spend it on, too few places to live and too few workers to do all the jobs that must be done. We have not attempted to include the documents relating to these matters in the record; in the interests of conserving paper and expense, but the court is empowered to take judicial notice of them. (*Chastleton Corp. v. Sinclair*, 264 W. S. 543).

Following the Presidential Proclamation of March 9, 1933 (1 C. F. R. Cum. Supp. 2.1, Sec. 120.1), declaring a "banking holiday", the Federal Government took steps to relieve the grave conditions from which the emergency resulted. Emergency relief legislation was enacted to meet widespread unemployment and the inadequacy of state and local relief funds. These enactments have since been terminated because the conditions they were designed to cure have been remedied (15 U. S. C. A., Secs. 721-728, and Secs. 721-728 app.; historical note).

Among the various agencies created was Works Progress Administration, the major function of which was to provide useful work on public projects for unemployed workers. This agency is now being liquidated, provision therefor having been made by an act of the Congress of the United States, July 12, 1943 (C. 229, Title I, 57 Stat. 540; note, 15 U. S. C. A. [App.], Secs. 721-728).

Another of the agencies created was the Civilian Conservation Corps for the purpose of providing employment as well as vocational training for youthful citizens who were unemployed and in need of employment (16 U. S. C. A., Secs. 584 et seq.). Congress, by Acts of July 2, 1942, C. 475, Title II, 56 Stat. 569, and July 12, 1943, C. 221, Title II, 57 Stat. 409, appropriated funds to enable the director of C. C. C. to provide for the liquidation of C. C. C., said liquidation to be accomplished as quickly as

possible but in any event not later than June 30, 1944 (16 U. S. C. A., Secs. 584 et seq., note).

Also, by an Act of Congress entitled Home Owners Loan Act of 1933, the Home Owners Loan Corporation was created. Its purpose was to grant long term mortgage loans, at low interest, to distressed home owners who were unable to procure financing through normal channels, and to help stabilize real estate and mortgage values (12 U. S. C. A., Secs. 1461 et seq.). As provided by the Act, the Corporation ceased its lending activities in 1936 and has since been engaged in liquidating its loans and other assets. Up to June 30, 1943, total loans, subsequent advances, and other investments of the Corporation in its loans, sales contracts and properties reached a cumulative total of \$3,484,000,000. On the same date \$1,852,000,000 or 53.1% of this amount, had been liquidated. Of the 195,600 properties taken over by the Corporation, 171,000 or 87%, had been sold. (See United States Government Manual, Winter 1943-44, p. 139. See also, Report of Home Owners Loan Corporation, 78th Congress, 2nd Session, House Document #448.)

The Federal Government also took other and more permanent measures to prevent a banking and financial collapse such as that which occurred in 1929 through 1933. Among the measures taken was the creation of the Federal Deposit Insurance Corporation (12 U. S. C. A., Secs. 264 et seq.). The chief function of the Corporation is to insure the deposits of all banks, Federal and State, entitled, under the Banking Acts of 1933 and 1935 to the benefits of insurance. Each depositor is insured to maximum amount of \$5,000. The reports of the Corporation will indicate the vast number of banks insured and the healthy state of the banking community.

Under the National Housing Act, approved June 27, 1934, subsequently amended (12 U. S. C. A., Secs. 1710 et seq.) there was created the Federal Housing Administration, "to encourage improvement in housing standards and conditions and to provide a system of mutual mortgage

insurance" and for other purposes. All the money loaned is private capital. The F. H. A. lends no money, its function being only to encourage the making of housing loans by private institutions through a system of mortgage insurance. This agency has insured mortgage loans well in excess of \$5,000,000,000, the exact figures of which may be gleaned from the 1943 and 1944 issues of "Portfolio", a quarter-annual publication of the Federal Housing Administration. (See U. S. Government Manual, Winter 1943-44, pp. 140-144).

The second World War started with the invasion of Poland by Germany on September 1, 1939, Great Britain having declared war on Germany on September 3, 1939. (See note re Proclamation of the President of the United States #2374, proclaiming a state of war between Germany and the several powers, 50 U. S. C. A. [App.], p. 58.) With the advent of war in Europe it became necessary for the United States of America to take serious consideration of the national defense and to set its productive processes in order.

The Lend Lease Act of March 11, 1941, C. 11, 55 Stat. 31 (see par. 2552, C. C. H., "War Law Service", Vol. 1), empowered the United States of America "to sell, transfer title to, exchange, lease or otherwise dispose of defense articles" and this country became the "arsenal of democracy".

The productive processes of the nation having been set in motion by the needs of those who were to be the nation's allies, and in the interest of national defense, the President issued Executive Order #8734, on April 11, 1941, establishing the Office of Price Administration and Civilian Supply (J. C. F. R., Cum. Supp. 2.1, p. 821) to control inordinate rises in prices and to regulate the supply of goods in the face of increased demands.

On December 7, 1941, there occurred the sneak attack on Pearl Harbor and on December 8, 1941, the United States declared war on Japan (Ch. 561, 55 Stat. 795) and on December 11, 1941, on Germany (Ch. 565, 55 Stat. 796). (See

C. C. H., "War Law Service," Vol. 1, paragraphs 2501 and 2502).

The entrance of the United States of America into the War required the nation's productive processes to be set in motion to the fullest capacity.

On January 30, 1942, the Emergency Price Control Act of 1942 (Ch. 56, Stat. 43, 50 U. S. C. A., secs. 901 et seq.) was approved. The Act was "declared to be in the interest of national defense and security and necessary to the effective prosecution of the present war" and its purposes "to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency, to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors and persons dependent on life insurance, annuities and pensions, from undue impairment of their standard of living * * * which would result in abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse in values * * *." (See 50 U. S. C. A. [App.], Secs. 901 et seq. and note thereunder.)

The annual wage and salary disbursements having risen tremendously and the markets having been flooded with purchasing power, the President, on September 9, 1942, sent his message to Congress calling attention to the need of an all inclusive control of the costs of production to prevent inflation (House doc. No. 834, Congressional Record of September 7, 1942, Vol. 88, p. 7283; reprinted U. S. Code Congressional Service, Vol. 9, 1942, p. 1514).

The Presidential message embodied a seven point program to avoid runaway inflation. We quote the President's seventh point (fol. 341):

"To keep the cost of living from spiralling upward we must discourage credit and instalment buying and encourage the paying off of debts, mortgages and other obligations, for this promotes savings, retards excessive buying, and adds to the amount available to the creditors for the purchase of war bonds."

By Act of October 2, 1942 (Ch. 578, 56 Stat. 765; 50 U. S. C. A. [App.], Secs. 961 et seq.), the President "in order to aid in the effective prosecution of the war" was "authorized and directed on or before November 1, 1942 to issue a general order stabilizing prices, wages and salaries * * *." (See C. C. H., "War Law Service", paragraphs 41031 et seq. for Emergency Price Control Act as amended.)

By Executive Order #9250, dated October 3, 1942, there was established the Office of Economic Stabilization (1 C. F. R. Cum. Supp. 2.1, p. 1213; see also Prentice Hall, "Wage Hour Service", paragraphs 6071 et seq., pp. 6071 et seq.). The Director, with the approval of the President, was mandated "to formulate and develop a comprehensive economic policy relating to the control of civilian purchasing power, prices, rents, wages, salaries, profits, rationing, subsidies and all related matters * * *."

Subsequently, on April 8, 1943, by Executive Order dated April 8, 1943, by virtue of the authority vested in the President by the First War Powers Act, 1941 (C. C. H., "War Law Service", Vol. 1, paragraphs 2582-2592) and the Act of October 2, 1942, amending the Emergency Price Control Act (supra) all wages and salaries were frozen and their control vested in the War Labor Board and the Treasury Department.

Under the Emergency Price Control Acts (supra) the Office of Price Administration is vested with control of rents in the interest of preventing undue increases therein because of growing demand in the face of dwindling supply. (See paragraph 41033, C. C. H., "War Law Service".) It is provided that the Administrator "in order to effectuate the purposes of this Act" shall "issue a declaration

setting forth the necessity for, and recommendations with reference to, the stabilization and reduction of rents for any defense rental area housing accommodations within a defense rental area" and "by regulation or order establish maximum rents". The State of New York has been designated a defense rental area and the greater portion of the state, especially the areas containing the large industrial areas, including the City of New York, have by regulation been made subject to maximum rents. (See paragraph 49111, C. C. H., "War Law Service," Price, Vol. 4, relating to various rental areas and paragraphs 49121 and following setting forth standard regulations.)

It has not only been found necessary to stabilize prices, profits, rents, etc., to prevent abnormal increases in prices, profits, rents, it also has been necessary to mobilize and utilize every available bit of manpower of the nation to perform the miracles of production which have been wrought in the last few years. To assure the most effective mobilization and utilization of the national manpower, by Executive Order, dated April 18, 1942, the War Manpower Commission was established. (See C. C. H., "Manpower Law Service," paragraphs 18254 and following, page 18251, setting forth Executive Order #9139 and successive orders amendatory thereof.)

On August 16, 1943, the War Manpower Commission found it necessary to impose regulations to "eliminate wasteful labor turnover", to reduce "unnecessary labor migration", direct the "flow of scarce labor where most needed in the war program" and to assure "the maximum utilization of manpower resources". (See Regulation #7, War Manpower Commission, Prentice Hall, "Wage Hour Service," paragraphs 1331 and following; also, C. C. H., "Manpower Law Service," paragraphs 18301-03).

Bearing out the necessity for the regulation and control of prices, rents, etc., in the face of scarcity of civilian goods and housing facilities, and indicative of swollen wage and salary incomes, is the enormous increase in bank deposits as reflected in the Report of the Superintendent

of Banks of the State of New York covering the year of 1943. (See 1944 Legislative Document #21.)

The foregoing indicates that the conditions giving rise to the emergency which in 1933 resulted in the Moratorium Law (Ch. 793 of the Laws of 1933) no longer exist. The emergency relief legislation has become executed and no longer is in effect; as witnessed by the liquidation of W. P. A. and C. C. C. The Federal Government has taken measures to prevent and alleviate future emergencies as manifested by F. D. I. C. The distressed home owner has been provided for and is no longer with us as indicated by the H. O. L. C., its loaning activities having been terminated in June of 1936, and its assets having been substantially liquidated. There is a free mortgage market on reasonable terms, as is made clear by the success of the F. H. A. program. The opportunities for employment have so reversed themselves, that it has been found necessary to control the manpower supply for its maximum utilization through the Manpower Commission. Incomes have been so tremendous in the face of scarce supplies, that it has been found necessary to control prices, rents, wages, salaries, and all the factors entering into the cost of production, to prevent further inflation in values, as witnessed by the "Price Control" and "Inflation Control" Acts and the "Wage and Salary Freezing Orders". The complete reversal of banking and financial conditions are fully demonstrated by the 1944 Report of the Superintendent of Banks of the State of New York. That real estate conditions are the very antithesis of what they were in 1933 is amply demonstrated by the record in this case.

Moratorium Legislation in Other States

A review of the moratorium situation throughout the United States is enlightening. Twenty-three states never adopted any mortgage moratorium legislation at all. Of the remaining twenty-five states which adopted moratorium

legislation, such legislation no longer exists in twenty-four of them. The only state which still has mortgage moratorium legislation on its statute books is the State of New York.

Mortgage moratorium legislation has been declared unconstitutional in the following states:

Iowa—*First Trust Joint Stock Land Bank of Chicago v. Arp* (283 N. W. Rep. 441).

Mississippi—*Jefferson Standard Life Insurance Company v. Noble* (188 S. Rep. 289).

Arizona—*Pouquette v. O'Brien* (100 Pac. Rep. [2d] 279).

Nebraska—*First Trust Company v. Smith* (277 N. W. Rep. 762).

Kansas—*Farm Mortgage Holding Co. v. Miller* (57 Pac. Rep. [2d] 35).

Texas—*Travelers Insurance Company v. Marshall* (76 S. W. Rep. [2d] 1007).

In the following states mortgage moratorium legislation has either been repealed or has expired:

Arkansas, Delaware, Idaho, Illinois, Louisiana, Maryland, Michigan, New Hampshire, Oklahoma, South Carolina, California, Minnesota, Montana, North Dakota, South Dakota, Ohio, Vermont and Wisconsin.

Points of Law

I

The recent decisions of this Court compel the conclusion that the New York State Mortgage Moratorium legislation is no longer valid.

II

The continued existence of an emergency is a necessary prerequisite to the validity of the statute.

III

The statute under attack cannot be sustained on the ground that a new emergency has arisen.

IV

No new emergency has arisen since 1933 to justify the continuance of the moratorium.

V

The Court of Appeals gives no valid reason to sustain the statute.

ARGUMENT

POINT I

The recent decisions of this Court compel the conclusion that the New York State Mortgage Moratorium legislation is no longer valid.

The record in this case contains overwhelming evidence that the "public emergency" of 1933 no longer continues. Indeed, if there were no record at all, it would be difficult to escape this conclusion. Everyone knows that there are jobs for all who will work; that people generally have money to spend; that spending is restricted because of the scarcity of goods and that bank deposits are gaining at

an unprecedented rate. These facts were not disputed at the trial. The Court of Appeals admitted that the "legislature could not ignore the great changes in the economic situation" (293 N. Y. 622, 628).

With regard to conditions in the time intervening between the trial and the hearing of this appeal, we rely on the knowledge of this Court and upon the continued policies of Congress and the Executive Branch of our Government to check inflation. The court is at liberty to draw on its own knowledge for the purposes of this case (*Chastleton Corp. v. Sinclair*, 264 U. S. 543).

The determination of this case requires merely the application of the principles laid down in the *Blaisdell* case (*Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398). In his opinion in that case Chief Justice Hughes posed several questions of constitutional law which were there presented for determination, namely (p. 429):

1. What is a contract?
2. What are the obligations of contracts?
3. What constitutes impairment of these obligations?
4. What residuum of power is there still in the state, in relation to the operation of contract, to protect the vital interests of the community?

The first three questions have been so fully and completely answered in that case that further discussion of them is unnecessary. On the authority of the *Blaisdell* case we may state with confidence the following conclusions with respect to the case at bar:

1. The mortgage held by appellant is a contract within the meaning of the Constitution.
2. The mortgage contains obligations which are within the protection of the contract clause.
3. The statute under attack impairs to some extent the obligations of the mortgage contract.

The fourth question, namely, the extent of the residuum of power in the states to legislate concerning existing contracts, cannot be categorically answered. The answer in each case depends upon its own facts and circumstances and, as the court notes, frequently involves problems both intricate and vexatious. Yet the court did undertake to define the limits of this residuum of power. The opinion points out (p. 435):

"Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing constitutional prohibition with the necessary residuum of State power has had progressive recognition in the decisions of this Court."

Quoting from Mr. Justice Brewer in *Long Island Water Supply Co. v. Brooklyn* (166 U. S. 685, 692), the court continues (pp. 435-436):

"But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulations, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control as conditions inherent and paramount, wherever a necessity for their execution shall occur."

Again, quoting from Mr. Justice Holmes in *Hudson Water Co. v. McCarter* (209 U. S. 349, 357), the court continues (pp. 437, 438):

"One whose rights such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter."

"The court continues (p. 439):

"Undoubtedly, whatever is reserved of State power must be consistent with the fair intent of the constitutional limitation on that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts, or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great calamity such as fire, flood or earthquake (see *American Land Co. v. Zeiss*, 219 U. S. 47; 55 L. ed. 82, 31 S. Ct. 200). The reservation of State power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of State power to protect the public interest in the other situations to which we have referred. And if State power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes."

Finally, the court concludes that when a temporary interposition of State power becomes necessary to relieve from a disaster, whether physical or economic, "it is limited to the exigency which called it forth" (p. 447):

" . . . the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts" (p. 447).

As stated by Lewis, J., in dissenting opinion in the Court of Appeals (293 N. Y. 622, 630):

" 'It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.' (Home Bldg. & L. Assn. v. Blaisdell, 290 U. S. 398, 442.) 'A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.' (Chastleton Corp. v. Sinclair (per Holmes, J.), 264 U. S. 543, 547-8.)"

To extend the application of the statutory restriction beyond the period of emergency during which the exercise of the sovereign power is warranted, defeats the purpose of the contract clause and threatens the "business of society", endangers "commercial intercourse", the "existence of credit", the "morals of the people" and the "sanctity of private faith" (see quotations from Marshall, Ch. J., in *Ogden v. Saunders*, set forth in the *Blaisdell* case, supra, p. 428).

➤ If it be the fact that the economic welfare of the people generally no longer requires restrictions upon the right to collect mortgage principal, then the moratorium legislation under attack goes beyond the limitations on State power as set forth in the *Blaisdell* case (supra). The legislation cannot be justified as a mere substitution of remedies for the restriction against collection of the principal of mortgage debts for a period of more than twelve years is not a mere modification of the remedy but is a substantial impairment of contractual rights of mortgagees (see *Oshkosh Water Works Co. v. Oshkosh*, 187 U. S. 437; *Barnitz v. Beverly*, 163 U. S. 118).

POINT II

The continued existence of an emergency is a necessary prerequisite to the validity of the statute.

The appellant does not dispute that in 1933, when the first moratorium law was enacted (Laws of 1933, Ch. 793) an emergency existed which justified the passage of the law and the temporary suspension of the contractual rights of mortgagees. We urge, however, that the emergency which originally justified such suspension was temporary in character. If this were not so, such suspension would have been unwarranted. Twelve years have now passed since the restriction was imposed. If it is the legislative finding that conditions of economic tension have continued for twelve years, then the conditions should no longer be characterized as temporary. We have proven that these conditions have righted themselves and neither the defendant nor the Court of Appeals asserts the contrary. But, if we are wrong and the Legislature is right, it must be held that such conditions have developed from a temporary emergency into a continuing status. It should be judicially held that instead of a temporary emergency the economic stress, which began with the depression, has brought about a downward revision of values which are not temporary in their nature. It is not within the scope of the reserved power of the State to deal with permanent revision of property values when the exercise of that power exceeds the constitutional limitation placed upon it by the contract clause of the Constitution.

Chief Justice Hughes states in the *Blaisdell* case, at page 426:

“While emergency does not create power, emergency may furnish the occasion for the exercise of power
• • •”

In *Wilson v. New* (243 U. S. 332, 348), it is stated:

" * * * although an emergency may not call into life a power which has never lived, nevertheless emergency might afford a reason for the exercise of a living power already enjoyed. * * * "

All exercise of the police power does not depend upon emergency. There are some subjects that are so inherently bound up with public welfare that the State has the right to legislate concerning them in order to preserve the public interest, even though contracts be impaired by such legislation; among these subjects are milk (*Nebbia v. New York*, 291 U. S. 502), insurance (*German Alliance v. Kansas*, 232 U. S. 389), intoxicating liquors (*Boston Beer Co. v. Massachusetts*, 97 U. S. 25), lotteries (*Stone v. Mississippi*, 101 U. S. 814), maintenance of nuisances (*N. W. Fertilizing Co. v. Hyde Park*, 97 U. S. 659), shares of stock in building and loan associations (*Veix v. 6th Ward Bldg. & Loan Assoc. of Newark*, 310 U. S. 32). There are other subjects which, by reason of practices of trade, progress of society, innovations of science or invention, and the like, develop a public aspect which might warrant the exercise of reserved State power where such exercise would not have been warranted in years past. We concede that housing is a subject of vital concern to the public and that the State has reserved power to deal with this subject for the protection of its citizens. It is conceivable that practices could develop in the business of financing new or existing housing facilities which might be injurious to the general public. If such practices involved mortgages, we have no doubt that the State could enact laws to correct the evil which had developed and such laws could not be attacked because they conflict with the contract clause, nor would it be necessary that such legislation be temporary or predicated upon an emergency. Permanent legislation could be enacted so as to stamp out the evil for all time (*Veix v. 6th Ward*, 310 U. S. 32, 329).

But such is not our situation. We have here no evil either in the past due mortgages themselves, or in the

practice through which they came into being. We have validly subsisting contracts which the State would undoubtedly have lent its power to enforce were it not for the sudden onset of an economic crisis for which no one was responsible and which mortgagor and mortgagee alike were without power to prevent. In such a crisis the reserved power of the State asserted itself for the protection of all its citizens. When the crisis subsided, the exercise of State power should have been withdrawn. The continued exercise of that power, beyond the economic necessity which called it into being, has created inequality in that the State is no longer protecting all its citizens but is preferring a favored group to the detriment of another group. The reserved power of the State cannot thus be constitutionally exercised (*W. B. Worthen Co. v. Thomas*, 292 U. S. 426).

In *W. B. Worthen v. Thomas* (supra), Chief Justice Hughes thus interprets the holding of the *Blaisdell* case (p. 433):

"But we also held that this essential reserved power of the state must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."

The Chief Justice made it clear that the only justification for the exercise of the State's reserved power with respect to mortgage contracts was the existence of a so-called "public disaster". Mortgages are entitled to protection of the State and are entitled to have preserved, their qualities as an acceptable investment for a rational investor (Cardozo, J., *W. B. Worthen v. Kavanaugh*, 295 U.S. 56, 60).

The legislation cannot be justified on the ground that there are still some people who require its help. The need must be general. We quote again from the *Blaisdell* case (supra, p. 446):

"It does not matter that there are or may be individual cases of another aspect. The legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief."

The 1943 renewal and subsequent renewals of the New York statute do not meet the foregoing test. The interest of mortgagors generally no longer requires the legislation and it disregards entirely the rights and interests of mortgagees.

In *Block v. Hirsch* (256 U. S. 135, at 157), Holmes, J., states:

"A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change."

In its present aspect the legislation seems to have survived the passing trouble. The trouble at which it is now directed is not of a passing nature. Property owners whose properties have not benefited by the general upturn in values are confronted by difficulties which are not transitory in their nature. The legislation cannot be sustained merely because it tends to relieve, for the time being, the troubles of this limited group.

POINT III

The statute under attack cannot be sustained on the ground that a new emergency has arisen.

For the first time in the New York Court of Appeals the learned Attorney General of the State of New York sought to justify the statute, not on the ground of the alleged emergency set forth in the statute itself, but on the ground

that a new emergency had come into being which warranted the Legislature in continuing the statutory restriction on the collection of mortgage debts. To support the existence of this new emergency he quoted the message of Governor Dewey to the Legislature on January 6, 1943, in which the Governor stated:

"During the economic collapse of the 1930's a mortgage moratorium was put into effect for the relief of distressed home owners. From year to year this has been renewed. In its present form it prevents foreclosure of mortgages so long as the home owner pays his interest and one percent of the principal each year. In many respects this is highly unsatisfactory. Today, a period of high economic activity, is a time when debts should be paid off. But we must recognize the existence of a new emergency. Wage ceilings, rent ceilings and taxes make it impossible for many property owners to liquidate their debts. Accordingly, I recommend continuance of the mortgage moratorium for another year" (1943 Leg. Doc. #1, p. 9).

This contention was answered in the dissenting opinion of Lewis, J. (293 N. Y. 622, at 630), where he said:

"We come then to the statute herè called into question (L. 1943, ch. 93) as to which it is important to note that, as in the nine preceding similar laws, the public emergency assigned as the reason for the mortgage moratorium legislation was not some new or different form of abnormality in 'economic and financial processes' affecting public welfare within the State. The reason for each succeeding enactment was the same and is typically expressed in the legislative finding within section 1 of chapter 93 of the Laws of 1943 with which we are now concerned and which provides in part: 'Section 1. The serious public emergency, *which existed at the time of the enactment of sections ten hundred and seventy-seven-a . . . of the civil practice act as added by chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three . . . having continued*, in the judgment of the legislature, *to the present time and still existing*, the provisions of such chapters . . . shall,

notwithstanding any provision of such chapter, remain and be in full force and effect until July first nineteen hundred forty-four * * * (Emphasis supplied.)"

The New York Legislature did not, in 1943, predicate the renewal of the moratorium upon any change in the economic situation although its legislative committee did recognize that substantial improvement had taken place in 1942 (fols. 82-90). It reiterated the same old emergency which it had declared to exist in Chapter 793 of the Laws of 1933, namely, the one "resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions."

It is interesting to note that the Governor's message in 1944 made no reference to any new emergency but flatly admitted that the adverse conditions which originally required the moratorium no longer exist. The following is the complete statement of the Governor on the subject of mortgage moratorium in his message to the Legislature on January 5, 1944:

"MORTGAGE MORATORIUM"

To meet the emergency conditions during the economic collapse of the 1930's a mortgage moratorium was put into effect. This has been renewed from year to year. In its present form it prevents the foreclosure of mortgages so long as the home owner pays his interest and 1% of the principal each year. *The conditions of unemployment and reduced income which called this legislation into being have long since passed.* The present period of high employment and high income is one in which debts ought to be paid off. Accordingly, I believe that while the mortgage moratorium should be continued so as to avoid undue, sudden hardship, the bill should provide for reasonable payments upon the principal of these debts and require the owners to maintain the premises in good condition" (1944 Leg. Doc. #1, pp. 15-16; emphasis supplied).

We may be sure that the only reason why the protagonists of the moratorium are asserting the existence of a new emergency is that they know that the old one has long since passed out of existence. However, the 1943 enactment cannot be sustained unless the court is satisfied that the legislative declaration of emergency as therein set forth was in accord with the facts. Such a conclusion is impossible on the record in this case.

POINT IV

No new emergency has arisen since 1933 to justify the continuance of the moratorium.

In the previous point we have adverted to the argument of the Attorney General in the Court of Appeals and to the statement in the Governor's 1943 message to the Legislature with respect to the existence of a new emergency. Since the case was argued and decided in the Court of Appeals, the New York State Legislature has again met and has once more renewed the moratorium in modified form (Laws of 1945, ch. 378, *infra*, p. 61). The new enactment, for the first time since 1933, couches the declaration of emergency in different and more extensive language than that contained in former renewals. We anticipate that the respondents on this appeal will attempt to use the new 1945 legislative declaration to sustain the 1943 statute, and for that reason we shall urge in this point that the expanded legislative declaration furnishes no greater justification for the continued moratory restriction than did the 1943 declaration. The new law provides in part as follows:

"Section 1. The serious public emergency, which existed at the time of the enactment of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f, and ten hundred seventy-seven-g of

the civil-practice act, as added by chapter seven hundred ninety-three of the laws of nineteen hundred thirty-three, and at the time of the enactment of section ten hundred seventy-seven-cc of the civil practice act, as added by chapter eight hundred ninety of the laws of nineteen hundred thirty-four, having continued, in the judgment of the legislature, to the present time and still existing because of the large amount of real estate which would be subject to immediate foreclosure if such sections and chapters were not continued in force and effect, and such emergency having been aggravated by the substantial amount of foreclosed real estate still held by insurance, banking and other financial institutions, by the imposition of ceilings on rents and wages at a time when there has been a disproportionate rise in maintenance and repair costs, and by the fact that over one million of the residents of this state are serving in the armed services of the nation, • • •"

Thus the 1945 Legislature has declared:

(A) That the 1933 emergency still exists because of the large amount of real estate which would be subject to immediate foreclosure.

(B) That the 1933 emergency has been aggravated by the substantial amount of real estate still held by insurance, banking and other financial institutions.

(C) That the 1933 emergency has been aggravated by the imposition of ceilings on rents and wages at a time when there has been a disproportionate rise in maintenance and repair costs.

(D) That the 1933 emergency has been aggravated by the fact that over one million of the residents of the State of New York are serving in the armed forces of the nation.

A

The new legislative declaration is a radical departure from previous declarations. It substantially limits the nature and character of the emergency. It no longer asserts

that there is an abnormal disruption in economic and financial processes, or that the credit and currency situations in the state and nation are abnormal, or that real property values are deflated, or that incomes are curtailed by unemployment or other adverse conditions. It states merely that "because of the large amount of real estate which would be subject to immediate foreclosure" if the moratorium were terminated, the emergency still continues.

Let us assume that, upon the termination of the moratorium, there will be a large amount of real estate subject to immediate foreclosure. It is evidently feared by the Legislature that a flood of foreclosure actions would follow such termination. This argument was developed at length in the court below. It was urged that the real estate market would become cluttered with offerings and that prices of real estate would tumble; that bad properties would all be foreclosed; that marginal real estate would be pulled down with the bad properties; that fiduciaries would be obliged to foreclose in order to prevent surcharges and that these developments might bring about another crisis. The Court of Appeals, in sustaining the statute, apparently gave great credit to this argument (293 N. Y. 622 at 628):

"On the other hand, an accumulation of past due mortgages resulting from the ten-year-old ban upon actions to foreclose mortgages for default in the payment of principal might reasonably cause apprehension that a flood of foreclosure actions would follow removal of the ban and might itself justify a statute reasonably calculated to stem the impending flood."

The answers to this contention are many, but the one answer which seems to us to deprive the argument of all its validity is that it ignores completely the basis for the exercise of the State's reserved power and is in reality an argument for the perpetuation of the restriction, or in any event, for its continuance long beyond permissible constitutional limits.

It is self-evident that every time the enforcement of rights is suspended for a period of ten years, there will be an accumulation of cases awaiting the removal of the suspension. If the existence of such conditions is to be used to prevent the removal of the ban, it simply means that the moratorium legislation can be extended indefinitely. The *Blaisdell* case (supra) does not stand for any such doctrine and we have looked in vain for any ruling of this Court which would warrant such an expansion of the reserved power of the State. If the contract clause of the Constitution may be thus ignored, then truly, we would reach a point which "takes us beyond the fixed and secure boundaries of the fundamental law into a precarious fringe of extra-constitutional territory in which no real boundaries exist" (Sutherland, J., in *W. B. Worthen Co. v. Thomas*, 292 U. S. 426 at p. 435).

The question which this Court must decide is not how many people will invoke the aid of the courts in asserting their contractual rights when those rights are restored following the period of suspension, but rather, whether the general economic welfare requires the continued suspension of contractual rights under existing conditions. If the general economic welfare does not so require, the economic forces constantly at work will absorb whatever flood may flow after the ban is lifted. Neither the court nor the Legislature could validly find that the number of expected foreclosures following removal of the bar would cause another economic crisis or threaten the welfare of the people generally. The record in this case overwhelmingly precludes any such finding. The real estate market in New York State is inflated. Money is plentiful. Housing is scarce. There has been no civilian building construction to speak of since conversion for defense and then for war purposes. What better time could be chosen to flood the market with real property offerings?

But, will the market be flooded? All the evidence indicates that there is no sound basis for such apprehension. Twelve years have passed since foreclosures for principal

defaults have been suspended. In that time the vast majority of past due mortgages have been extended voluntarily by agreement between mortgagor and mortgagee. Property owners have readily agreed to amortize their mortgages beyond statutory requirements in consideration of interest reductions and other modifications of the mortgage contract. We have shown (Plff.'s Exs. 9, 10, 11, p. 146) that the mortgages held by savings banks in Brooklyn and Queens, which were being amortized at the statutory rate, or less, in 1942 were only a small percentage of the total mortgages held (see supra, pp. 7-8). There need be no apprehension concerning a large amount of past due mortgages subject to foreclosure. Savings banks in New York State for many years followed the practice of holding open mortgages in their portfolio without causing property owners to be in constant fear of foreclosure. No mortgage will be foreclosed in these days of plentiful free money seeking investment, provided the security is adequate and the owner is willing to liquidate his indebtedness on a reasonable basis.

We have proven that mortgages can be readily refinanced where the security warrants it (Punia, fol. 211; Bode, fol. 313). Undoubtedly there will be foreclosures, but these will be on properties which have been depreciated to such an extent that they are no longer worth the amount of the mortgage. As to them, there is no emergency and the moratorium when applied to mortgages on such properties has been invalid for many years. If the current inflation in real estate values has not brought the value of these properties in the present market to a point where they have an equity over and above the existing mortgage, then it is time that the owner should be divested of an equity which is really non-existent, and the mortgagee permitted to legally salvage what he can of his mortgage investment.

B

It is asserted that there is a substantial amount of foreclosed real estate still held by insurance, banking and other financial institutions. We assert that the overhang of institutional real estate from the depression was insignificant in 1943 and is today practically non-existent. Of course, every institution probably retains, involuntarily, some residue of foreclosed real estate but such residue consists in the main of structures having some special use or unique character not affected by general real estate trends, or so obsolete that it has outlived its usefulness. If any institutions are carrying other types of real estate on their books we may be sure that it is because such real estate is being deliberately held, either because its rental return is highly satisfactory or its owners expect future benefit by reason of the inflationary trend.

The trial court predicated its decision sustaining the moratorium upon the fact that there was an overhang of institutional real estate. The court used the following language (182 Misc. 863; fols. 489-490):

"The figures show that member banks in Brooklyn had an overhang of real estate as of the end of 1939 of \$49,360,469; and as of January 1st, 1944 of \$17,105,680. In Queens the figures were (plaintiff's exhibit 6) at the end of 1939, \$9,807,417; and as of January 1st, 1944, \$3,857,742. In Nassau the figures were at the end of 1939 \$2,487,143; and as of January 1st, 1944, \$495,952."

Continuing the court states (fol. 491):

"There is still to be liquidated and was at the time of the commencement of this action, a considerable amount of real estate held by savings banks, insurance companies, Home Owners Loan Corporation and the trustees of estates. Not until the holdings of these unwilling owners of real estate have been reduced so that they are no longer a factor in competition with real estate of those who willingly acquired real estate and are willing but not forced to sell can it be said that there is a normal real estate market."

We believe that the trial court drew erroneous conclusions from the figures stated. The figures actually show that the overhang of institutional real estate is trivial. The figures were taken from Plaintiff's Exhibit 6 (p. 141). However, if the figures in the first column of Plaintiff's Exhibit 6, showing other real estate held, are read in conjunction with the breakdown of other real estate held as of January 1, 1944 (Plaintiff's Exhibit 5, p. 140), the following appears:

Out of the \$17,105,680 of real estate held by Group V Savings Banks on January 1, 1944, there were but 120 one-family houses totalling \$668,107 and but 147 two-family houses totalling \$750,189. The balance of this real estate consisted chiefly of stores and apartments, business properties, specialties and vacant land. These figures should be considered in the light of the total real estate involved. In the tax year 1941-42 there were in Brooklyn 90,165 one-family houses having an assessed valuation of \$598,610,815. Group V Savings Banks only owned 120 of these houses totalling \$668,107. This is 0.133% of the total number of houses and 0.111% of the total assessed valuation.

In the same tax year there were in Brooklyn 93,286 two-family houses having an assessed valuation of \$748,874,705. Group V Savings Banks only owned 147 of these houses totalling \$750,189. This is 0.157% of the total number of houses and 0.10% of the total assessed valuation.

An analysis of the Queens figures is equally striking. Of the \$3,857,742 of Queens real estate held by Group V Savings Banks there were 119 one-family houses totalling \$749,399 and 35 two-family houses totalling \$198,063. More than 75% of the overhanging real estate consisted of store properties with apartments above, business properties and specialties and vacant land.

In Queens County for the tax year 1941-42 there were 152,246 one-family houses having an assessed valuation of \$794,877,238. Group V Savings Banks held only 119 of

these houses totalling \$749,399. This is 0.077% of the total number of houses and 0.094% of the total assessed valuation.

In the same tax year there were in Queens 52,239 two-family houses having an assessed valuation of \$380,532,897. Group V Savings Banks only held 35 of these houses totalling \$198,063. This is 0.066% of the total number of houses and 0.052% of the total assessed valuation.

There can be no doubt that the Legislature, in repeatedly renewing moratorium legislation, has been acting from a desire to assist the small home owner in the one or two-family home group. This is clear from the Janes Committee Report (Legislative Document 1942, #45) and the Nunan Committee Report (Legislative Document 1938, #58). The total of the one- and two-family houses held by Group V Savings Banks on January 1, 1944, is so negligible that the trial court should have drawn a contrary conclusion.

Similarly, if we take the totals used by the trial court and compare them with the total real estate in Brooklyn and Queens the conclusion is equally inevitable that the overhanging institutional real estate was negligible on January 1, 1944. As compared with the \$17,105,680 of real estate held by Group V Savings Banks on January 1, 1944, the assessed valuation of real estate in Brooklyn for the tax year 1944-45 is \$3,290,594,000. As compared with the \$3,857,742 of real estate held by Group V Savings Banks in Queens, the total assessed valuation of Queens real estate for the tax year 1944-45 is \$2,153,575,000.

It cannot be said from these figures that realty holdings of institutions and other unwilling owners were a sufficient factor in the real estate market to make such market abnormal.

Recent figures of the Home Owners Loan Corporation embracing its activities for the year 1944 show that the overhang of real estate in that corporation is comparatively very small (see article in New York Times, March

18, 1945, *infra*, p. 67). It appears that the Home Owners Loan Corporation has left only 832 of the 34,567 dwellings it had taken over in New York. Moreover, the corporation loaned a total of \$509,918,504 on 80,115 dwellings in New York and 55% of this amount has been liquidated. *The corporation took over 195,970 dwellings as a result of mortgage defaults and by the end of 1944 it had sold 99% of these dwellings, leaving but 1,935 dwellings on its hands at the end of 1944 in the entire nation!*

C

We now consider the legislative assertion that the imposition of ceilings on rents and wages aggravates the old emergency and justifies the continuance of the moratorium. This assertion is false. It overlooks the fact that ceilings on rents and wages are themselves emergency measures justified only because the economic welfare requires their imposition in order to prevent runaway inflation. The Office of Price Administration, created under the Emergency Price Control Acts (*supra*, p. 21), is empowered to control rents because the demand for housing is greater than the supply and rents would skyrocket unless controlled. In addition to the O.P.A. rent regulations relating to residential housing, the New York State Legislature has provided for rent regulations in the business and industrial field. In the session just concluded on March 24, 1945, ceilings have been imposed on industrial rents (Ch. 3, Laws of 1945, as amended by Ch. 315, Laws of 1945) and on office and store rents (Ch. 314, Laws of 1945). Both Chapter 3 and Chapter 314 of the Laws of 1945 contain a declaration of emergency which purports to justify the exercise of the reserved power of the State so as to restrict the rights of landlords under existing and future leases and rental agreements (see *infra*, pp. 65-66).

It must be clear that the public emergency which gave rise to the moratorium law in 1933 was the result of conditions which were the direct opposite of conditions existing today. The pendulum has swung from the extreme left to

the extreme right. The economic cycle has carried us from the depths of depression to a period of great prosperity. This prosperity has been induced to a substantial degree by the war and is therefore attended by great dangers to the public welfare. Congress, the President, the legislative and executive branches of government in the nation and the states have recognized the potential dangers to the people in the form of inflation, rent gouging, reckless evictions of families unable to pay exorbitant rents, over-reaching by landlords against business and industrial tenants, whether engaged in war production or not, and related abuses which experience has taught us to expect when there has been a stoppage of building construction and production for civilian use is severely curtailed.

One of the cures which has been prescribed by the President is the payment of debts. The Governor of the State of New York, in his 1943 and 1944 messages, issued a similar prescription at the same time that he recommended continuance of the moratorium. The state cannot pursue two diametrically opposite courses of action and attempt to justify both by the existence of alleged emergencies said to spring from separate sets of economic conditions which could not possibly co-exist. The reserved power of the state cannot be called upon simultaneously to justify otherwise unconstitutional legislation which, on the one hand undertakes to deal with a deflated economy and on the other hand undertakes to deal with an inflated economy.

It is impossible to reconcile the existence of an alleged emergency which threatens to send rentals skyrocketing with the alleged continuance of economic conditions which render it impossible for property owners to live up to their mortgage contracts. This does not mean that some people may not still have trouble meeting their mortgage debts. It is true that some workers have not benefited by the improvement in economic conditions to the same extent that workers generally have so benefited. But the test of the continued validity of the moratorium law is not whether there are still some surviving cases of hardship, but rather,

whether conditions generally have not so improved that the public welfare no longer requires the holders of mortgage contracts to sacrifice their rights for the general good.

We understand from the *Blaisdell* case (supra, p. 446) that the exercise of the reserved power of the state will be sustained when it is dealing with the general or typical situation. When the situation is no longer general or typical, such legislation cannot be sustained. The typical situation today is one where every adult in the family is either in the service or has a job and, even after paying taxes, still has more money left than he can spend on worthwhile things. Part of this excess money goes into savings banks and war bonds. More of it goes for amusements. Some of it finds its way into the black market. President Roosevelt and Governor Dewey have both said this money should be used to pay debts.

D

The fact that over one million residents of New York State are serving in the armed forces of the nation cannot justify the renewal of the moratorium, for they do not require moratorium legislation for their protection.

The Soldiers and Sailors Civil Relief Act of 1940 (Public Law No. 861, 76th Congress, Chap. 888, 3rd session, as amended by Public Law 732, 77th Congress, Chap. 581, 2nd session) affords the men and women of the State of New York serving in the armed services and their dependents greater protection against mortgage foreclosure than the New York State Mortgage Moratorium Law.

While there is no absolute prohibition against foreclosure where the default is solely for non-payment of principal, the court in which any proceeding is commenced for any breach of the terms of the mortgage "may, after hearing, in its discretion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service:

- (a) stay the proceedings as provided for in this Act;

- (b) make such other disposition of the case as may be equitable to conserve the interests of all parties" (50 U. S. C. A. App., Sec. 532 (2); 54 Stat. 1182, as amended by 56 Stat. 771, 772).

Under Section 204 of the Act (54 Stat. 1182, 50 U. S. C. A. App. Sec. 524, Chap. 888; Public Law 861, 76th Congress) the court may stay any action or proceeding for the period of military service and three months thereafter, subject to such terms as may be just.

There is further provision that no sale, foreclosure, or seizure of property for non-payment of any sum due under any mortgage obligation made prior to a service man's induction or for any breach of the terms thereof, shall be valid if made after the date of the enactment of the Soldiers and Sailors Relief Act Amendments of 1942, and during the period of military service or within three months thereafter, unless upon an order previously granted by the court and a return thereto made and approved by the court (50 U. S. C. A. App. Sec. 532 (3), Chap. 581; Public Law 732, 77th Congress, Sec. 302 (3); 54 Stat. 1182, as amended by 56 Stat. 771, 772).

Under this Civil Relief Act the men and women of the services are afforded the complete protection of our courts not only as to mortgages made before July 1, 1932, as in the case of the New York State Mortgage Moratorium Law, but also those made after that date and before their induction into military service.

Relief is afforded not only for a breach of non-payment of principal but for any breach of the mortgage contract including defaults for non-payment of interest and taxes. This Act protects not only the service men and women but also their dependents (Chap. 581, Sec. 306, 56 Stat. 772).

It may be added that the Civil Relief Act applies not only to the mortgage contract but to any obligation of a service man or woman arising before their induction.

POINT V

The Court of Appeals gives no valid reason to sustain the statute.

Chief Judge Lehman states (*supra*, p. 628):

"The Legislature did not, in 1943, find that these conditions still existed. It found only that the 'serious public emergency' existing in 1933 and 'resulting' from these conditions still existed. In 1943 the fact that payrolls and savings bank deposits had increased in almost unprecedented degree was a matter of common knowledge. The Legislature could not ignore the great changes in the economic situation."

The Chief Judge then attempts to justify the statute by the "apprehension that a flood of foreclosure actions" would follow its termination and by "the fact that abnormal conditions incident to a war economy or resulting from other causes might still constitute a threat" to the public welfare. In the preceding point we have demonstrated that the fear of foreclosures is no valid reason for continuing the statute. For such a reason would extend the impairment of contracts beyond the constitutional limitation. We have also shown that the abnormal conditions incident to a war economy require the payment of debts rather than forbearance.

The only element of justification left in the Court of Appeals opinion is the statement that while the adverse conditions of 1943 have passed "the public emergency" resulting from these conditions still exists. It is difficult to understand how the emergency could continue after the conditions creating it have passed. Further, it is difficult to see how it makes any difference, from a constitutional standpoint. There is no constitutional power in the legislature to extend the remedy beyond the existence of the abnormal conditions which originally justified it. Although the Court of Appeals has drawn a sharp distinction be-

tween the emergency and the adverse conditions it created, the court has failed to use language which suggests any genuine basis for the distinction. What is it that survives the improvement in conditions and continues to exist as an emergency?

If a man of substantial means was wiped out in the stock market crash of 1929, he might still be penniless today even though the stock market had long since fully recovered and the conditions causing the crash had completely righted themselves. It might be said that the emergency survived insofar as it affected the individual crash victim, but such personal emergency or individual hardship could not justify the extension of legislation enacted for the general public welfare which suspended contractual obligations pending the return of economic equilibrium. An earthquake, fire or flood might render many people homeless and therefore call into being the reserved power of the State so as to bring relief to the victims of the catastrophe, but the legislative relief thus granted could not be continued until the victims had been fully restored, physically and financially, to their prior status. Such an event might never come to pass. The legislation is warranted so long as there is trouble of a public nature to deal with but it cannot continue on for the relief of individual hardship even though there be a large number of persons suffering such hardship.

The temporary suspension of constitutional mandate can be justified only in the general public interest. Specifically, the suspension of the obligation of mortgage contracts was justified by the general economic need in order to preserve some semblance of values and prevent widespread financial ruin due to temporary critical conditions. The heart of the moratorium legislation is the economic crisis. Just as the human body cannot survive when the heart stops beating, so the restriction on mortgagee's contractual rights cannot validly live on after the economic crisis has passed.

Reflecting on this well-recognized doctrine, the query recurs as to what the Court of Appeals meant by its holding that the emergency persists although the adverse economic conditions are no more. We submit it must have meant that, while the economic welfare of the public generally had been fully restored and they no longer require legislative relief from mortgage obligations, yet there were numerous individual situations which the general economic improvement had not helped and as to them, a so-called emergency survived. The existence of such a circumstance cannot save the legislation.

In concluding the prevailing opinion, Chief Judge Lehman states:

"It is entirely unimportant whether the conditions then existing have created a new emergency, as said by the Governor in his message, or have, as the Legislature said, resulted in the continuance of an emergency itself created by conditions which have run their course. The question which the court must decide is whether the Legislature in the challenged statute has provided an appropriate remedy to tide over an exigency resulting from present conditions. We have said in an analogous case that: 'Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the exercise of the reserved power of the state and whether the remedy adopted by the state is reasonable and legitimate.' (Matter of People [Tit. & Mtge. Guar. Co.], *supra*, p. 94.)"

We refer to the foregoing language of the Court of Appeals because we do not understand it. If it means that it is within the power of the New York State Legislature to pass a statute impairing the obligation of mortgage contracts in the absence of an economic crisis possessing the character and proportions of a public emergency, then such holding is in conflict with the decision of this Court in the *Blaisdell* case (*supra*) and should be reversed. On the other hand, if it means that an economic crisis is still

required, it makes no difference whether we call such a crisis an "emergency" or a "situation", the principle is the same. In any event, the language is confusing, and might be construed to confer a power upon the State Legislature which this Court has repeatedly denied.

CONCLUSION

The judgment of the Court of Appeals should be reversed with costs and the case remitted to the Supreme Court with a direction that judgment be entered in favor of the plaintiff.

Respectfully submitted,

JOHN P. McGRATH,
Counsel for Appellant.

JOHN P. McGRATH,
JOHN J. BUCKLEY,
CHARLES H. HEINLEIN,
on the brief.

EXHIBIT I

CHAPTER 793, LAWS OF 1933

AN ACT to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages.

BECAME a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

Section 2. The civil practice act is hereby amended by inserting therein new sections, to be sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f and ten hundred seventy-seven-g, to read as follows:

Section 1077-a. FORECLOSURE FOR PRINCIPAL DEFAULTS SUSPENDED.—During the period of the emergency as defined in section ten hundred seventy-seven-g, and notwithstand-

ing any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of default in the payment of principal secured by such mortgage or solely in the payment of any installment of principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act.

Section 1077-b. ACTIONS ON BONDS FOR PRINCIPAL DEFAULTS SUSPENDED.—No action shall be maintainable or judgment shall be entered during such emergency, upon any loan, indebtedness, bond, extension agreement, collateral bond, or other evidence of indebtedness or liability, whether or not such indebtedness or liability shall have been thereafter reduced, extended, or modified, if the indebtedness originated or was originally contracted for simultaneously with such mortgage and is secured solely by such mortgage, or upon any guaranty of payment of the principal or installment of principal of any mortgage within the scope of section ten hundred seventy-seven-a or upon a guaranty of any obligation secured by such mortgage, so long as no action or proceeding shall be maintainable to foreclose such mortgage. No action shall be maintainable or judgment be entered during such emergency upon any guaranty of payment of any share or part of any bond and/or mortgage or group of bonds and/or mortgages

represented by a certificate, bond, debenture or other instrument, nor upon any note, bond, debenture or other instrument being part of a series issued against, or secured by the deposit of a bond and/or mortgage or a group of bonds and/or mortgages so long as interest at the rate prescribed shall be paid upon any such certificate, note, bond, debenture or other instrument. The liability of any endorser, guarantor of, or surety for any such liability shall not be discharged by reason of the failure of the holder to demand payment of any such indebtedness or liability, or by reason of any failure to give notice of non-payment, or by reason of any failure to bring any action or proceeding thereon during the emergency.

Section 1077-c. NOTICE OF APPLICATION.—Notwithstanding the foregoing provisions, any person who would otherwise have the right to foreclose a mortgage, shall have the right to make an application to any court in which such foreclosure action might be brought upon eight days notice, served personally, or in such manner as the court may direct to the last record owner of the mortgaged property, and if upon such application it shall appear to the satisfaction of the court that the mortgaged property during the six months prior to the application shall have produced a surplus over and above the taxes, interest and all other carrying charges, then the court may make an order directing the payment of such surplus or such part thereof as the court may determine to the mortgagee to apply toward the reduction of any past due principal. In the event of default in making of such payment for thirty days after service of a copy thereof with notice of entry thereof, then and in such event the applicant may maintain an action to foreclose such mortgage. In any such proceeding the court may enter an order permitting foreclosure without other proof if the owner of the property shall fail to make available for inspection by the mortgagee and the court all records and data available

as to the income and disbursements, or if the owner shall fail to produce adequate records or data of income and disbursements.

This section shall not apply to properties used or intended to be used for farming purposes or dwellings occupied by the owner or by the owner in conjunction with not more than one other family.

Section 1077-d. WAIVER AGAINST PUBLIC POLICY.—Any covenant or agreement or understanding in or in connection with or collateral to any mortgage whereby a mortgagor waives or agrees to waive the protection intended to be afforded to him by sections ten hundred seventy-seven-a and ten hundred and seventy-seven-b, shall be deemed to be void as against the public policy and be wholly unenforceable.

Section 1077-e. APPLICATION TO PENDING ACTIONS.—Sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-d shall apply to any action or proceeding heretofore instituted for the foreclosure of a mortgage within the scope of this act unless the same has proceeded to final judgment directing the sale of the mortgaged premises, and any such action shall be dismissed upon payment by any defendant to the plaintiff of taxable costs and the remedying of any default other than the payment of principal or any installment of principal within thirty days after this act takes effect, but otherwise such action or proceeding may continue.

Section 1077-f. STATUTE OF LIMITATIONS NOT TO RUN DURING EMERGENCY.—Any action or proceeding within the scope of this act, which would have been maintainable at any time during the period of the emergency, shall not be barred by any provision of article two of the civil practice act during a period of one year after the termination of the emergency. This section shall not be construed to shorten the period within which any such action may be commenced.

Section 1077-g. MORTGAGES NOT AFFECTED.—The provision of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of sections three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any obligations in connection with or secured by any such mortgages. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred thirty-four.

Section 3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part thereof.

Section 4. This act shall take effect immediately.

EXHIBIT II**CHAPTER 93, LAWS OF 1943**

AN ACT to amend chapter seven hundred eighty-two of the laws of nineteen hundred forty-one, entitled "An Act to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages and to extend the mortgage moratorium and setting forth the terms and conditions of such extension," in relation to continuing the provisions thereof until July first, nineteen hundred forty-four.

BECAME a law March 11, 1943, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of chapter seven hundred eighty-two of the laws of nineteen hundred forty-one, entitled "An Act to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages and to extend the mortgage moratorium and setting forth the terms and conditions of such extension," is hereby amended to read as follows:

Section 1. The serious public emergency, which existed at the time of the enactment of sections ten hundred and seventy-seven-a, ten hundred and seventy-seven-b, ten hundred and seventy-seven-c, ten hundred and seventy-seven-d, ten hundred and seventy-seven-e, ten hundred and seventy-seven-f and ten hundred and seventy-seven-g of the civil practice act, as added by chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three, and at

the time of the enactment of section ten hundred and seventy-seven-cc of the civil practice act, as added by chapter eight hundred and ninety of the laws of nineteen hundred thirty-four, having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters seven hundred and ninety-three of the laws of nineteen hundred thirty-three and eight hundred and ninety of the laws of nineteen hundred thirty-four shall, notwithstanding any provision of such chapter, remain and be in full force and effect until July first, nineteen hundred forty-four, and, in conformity with such extensions, section ten hundred and seventy-seven-g of the civil practice act, as added by such chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three and last amended by chapter seven hundred and eighty-two of the laws of nineteen hundred forty-one, is hereby amended to read as follows:

Sec. 1077-g. Mortgages not affected. The provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage or the modification or extension of any mortgage insured, or hereafter insured under the provisions of the national housing act in effect June twenty-seventh, nineteen hundred thirty-four, as said act has been or is hereafter amended from time to time or to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of sections three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any installments or amortization of principal, the payment of which

is provided for by extension or modification executed on or after July first, nineteen hundred thirty-seven, nor to the mortgages so extended or modified, nor to any obligations in connection with or secured by any such mortgages. The provisions of said sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f, shall apply to the final payment of principal of the mortgages so extended or modified if all installments or amortization the payment of which is provided for by such extension or modification are made as provided for by such extension or modification.

Notwithstanding the provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, and ten hundred seventy-seven-f, and in addition, to the cases therein provided for the commencement of foreclosure actions, and not in limitation thereof, any owner or holder of a mortgage covering real property as to which there is a default in the payment of any of the principal amount thereof as provided in the instrument creating the mortgage debt or any modification or extension thereof may commence an action to foreclose such mortgage unless the owner of the mortgaged premises shall pay the unpaid principal amount thereof at the rate of one per centum per annum. Such principal payments shall accrue from July first, nineteen hundred forty-two and shall be payable on October first, nineteen hundred forty-two and quarterly thereafter.

In any action or proceeding for the foreclosure of a mortgage on real property or any interest therein or in any foreclosure under article seventeen of the real property law instituted by reason of default in the payment of installment or amortization the payment of which is provided for by such extension or modification, or by the

terms of this section, if such action or proceeding has not proceeded to final judgment directing the sale of the mortgaged premises, then such action shall be dismissed and discontinued upon the payment by any defendant to the plaintiff of the taxable costs and disbursements, and the payments of such installment or amortization in default and the remedying of any other default under the terms of such mortgage or extension or modification. ~~The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred forty-four.~~

Section 2. This act shall take effect immediately.

EXHIBIT III.

CHAPTER 378, LAWS OF 1945

Introduced by Senate Committee on Rules.

~~AN ACT to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages and to further extend the mortgage moratorium and setting forth the terms and conditions of such extension.~~

BECAME a law April 2, 1945, with the approval of the Governor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The serious public emergency, which existed at the time of the enactment of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred

seventy-seven-e, ten hundred seventy-seven-f, and ten hundred seventy-seven-g of the civil practice act, as added by chapter seven hundred ninety-three of the laws of nineteen hundred thirty-three, and at the time of the enactment of section ten hundred seventy-seven-cc of the civil practice act, as added by chapter eight hundred ninety of the laws of nineteen hundred thirty-four, having continued, in the judgment of the legislature, to the present time and still existing because of the large amount of real estate which would be subject to immediate foreclosure if such sections and chapters were not continued in force and effect, and such emergency having been aggravated by the substantial amount of foreclosed real estate still held by insurance, banking and other financial institutions, by the imposition of ceilings on rents and wages at a time when there has been a disproportionate rise in maintenance and repair costs, and by the fact that over one million of the residents of this state are serving in the armed services of the nation, the provisions of such chapters seven hundred ninety-three of the laws of nineteen hundred thirty-three and eight hundred ninety of the laws of nineteen hundred thirty-four, as amended, shall, notwithstanding any provision of such chapters, remain and be in full force and effect until July first, nineteen hundred forty-six, and section ten hundred seventy-seven-g of the civil practice act, as added by chapter seven hundred ninety-three of the laws of nineteen hundred thirty-three and last amended by chapter five hundred sixty-two of the laws of nineteen hundred forty-four, is hereby amended to read as follows:

Section 1077-g. Mortgages not affected. The provisions of section ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage or the modification or extension

of any mortgage insured, or hereafter insured under the provisions of the national housing act in effect June twenty-seventh, nineteen hundred thirty-four, as said act has been or is hereafter amended from time to time or to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of section three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any installments or amortization of principal, the payment of which is provided for by extension or modification executed on or after July first, nineteen hundred thirty-seven, nor to the mortgages so extended or modified, nor to any obligations in connection with or secured by any such mortgages. The provisions of said sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, and ten hundred seventy-seven-f, shall apply to the final payment of principal of the mortgages so extended or modified if all installments or amortization the payment of which is provided for by such extension or modification are made as provided for by such extension or modification.

Notwithstanding the provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, and ten hundred seventy-seven-f, and in addition to the cases therein provided for the commencement of foreclosure actions, and not in limitation thereof, any owner or holder of a mortgage covering real property as to which there is a default in the payment of any of the principal amount thereof as provided in the instrument creating the mortgage debt or any modification or extension thereof may commence an action to foreclose such mortgage unless the owner of the

mortgaged premises shall pay the unpaid principal amount thereof at the rate of one per centum per annum for the period commencing July first, nineteen hundred forty-two, and terminating June thirtieth nineteen hundred forty-four and at the rate of two per centum per annum for the period commencing July first, nineteen hundred forty-four, and terminating June thirtieth, nineteen hundred forty-five, and at the rate of three per centum per annum thereafter. Such principal payments shall accrue from July first, nineteen hundred forty-two and shall be payable on October first, nineteen hundred forty-two and quarterly thereafter.

In any action or proceeding for the foreclosure of a mortgage on real property or any interest therein or any foreclosure under article seventeen of the real property law instituted by reason of default in the payment of installment or amortization the payment of which is provided for by such extension or modification, or by the terms of this section, if such action or proceeding has not proceeded to final judgment directing the sale of the mortgaged premises, then such action shall be dismissed and discontinued upon the payment by any defendant to the plaintiff of the taxable costs and disbursements, and the payments of such installment or amortization in default and the remedying of any other default under the terms of such mortgage or extension or modification. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred forty-six.

Section 2. This act shall take effect immediately.

EXHIBIT IV

Extract from Chapter 3 of Laws of 1945 containing declaration of emergency. This act establishes emergency rent control for commercial space in the State of New York.

"Section 1. Unjust, unreasonable and oppressive leases and agreements for the payment of rent for commercial space in certain cities having been and being now exacted by landlords from tenants under stress of prevailing conditions accelerated by the present war, whereby a breakdown has taken place in normal processes of bargaining and freedom of contract has become an illusory concept, and whereby there have come into existence conditions threatening to obstruct war production and the production and distribution of essential civilian commodities, and to cause inflation, and all of the foregoing situations and conditions being a threat to the successful prosecution of the war and essential civilian activities, and to the public safety, health, and general welfare of the people of the state of New York, it is hereby declared that a public emergency exists, which is increasing in intensity without slackening and without promise of relief so long as present war conditions continue, and that action by the legislature is imperative and will not permit of delay. It is hereby found by the legislature that for the duration of such emergency, the establishment of a maximum rent for commercial space at a level of fifteen per centum above rents charged on March first, nineteen hundred forty-three, or at a level otherwise determined as provided herein, will curb the evils arising from such emergency and will accomplish the purposes hereby sought to be achieved. This act is declared to be a measure designed to protect and promote the public health, safety and general welfare, to aid the successful prosecution of the war, and essential civilian activities, and to prevent inflation, and is made necessary by an existing public emergency."

EXHIBIT V

Extract from Chapter 314 of Laws of 1945 containing declaration of emergency. This act establishes emergency rent control for business space in the State of New York.

"Section 1. Unjust, unreasonable and oppressive leases and agreements for the payment of rent for office space and retail stores and other business space in certain cities having been and now being exacted by landlords under stress of prevailing conditions accelerated by the war, and an abundance of eviction proceedings against tenants having been commenced or threatened by landlords, whereby breakdown has taken place in normal processes of bargaining and freedom of contract has become an illusory concept, and whereby there have come into existence conditions threatening to obstruct war production, and the production and distribution of essential civilian commodities, and the rendition of essential services, professional and otherwise, and to divert essential manpower materials and transportation facilities, and to cause inflation, and all of the foregoing situations and conditions being a threat to the successful prosecution of the war and essential civilian activities, and to the public safety, health and general welfare of the people of the state of New York, it is hereby declared that a public emergency exists, which is increasing in intensity without slackening and without promise of relief so long as present war conditions continue, and that action by the legislature is imperative and will not admit of delay. It is hereby found, therefore, as a matter of legislative determination, that for the duration of such emergency, the establishment of a maximum rent for office and retail store and other business space at a level of fifteen per centum above rents charged on June first, nineteen hundred forty-four or at a level otherwise determined as hereinafter provided, will curb the evils arising from such emergency and will accomplish the purposes hereof. This act is declared to be a measure designed to protect and promote the public health, safety and general welfare, to aid the successful prosecution of the war, and essential civilian activities, and to conserve manpower, essential materials and transportation facilities, and to prevent inflation, and is made necessary by an existing emergency."

EXHIBIT VI

ARTICLE, NEW YORK TIMES FOR MARCH 18, 1945.

"HOLC IN 1944 SOLD 5,843 HOUSES HERE

**It Started New Year Owning Only 832 of the 34,567
Properties it Took Over.**

Book Losses Are Heavy

**But Fahey Forecasts Original Capital of \$200,000,000 Will
be Repaid in Full.**

Under the impetus of a brisk wartime market and aggressive steps to improve its position in this area, the Home Owners Loan Corporation in New York last year sold 5,843 houses that it had been forced to take over in foreclosure, John H. Fahey, Commissioner of the Federal Home Loan Bank Administration, reported yesterday. The agency also succeeded in reducing its mortgages and investments in the State by \$54,657,343 to a balance of \$230,277,500 at the end of 1944.

The sales completed in this State last year represented more than half of the total sales for the nation and left the HOLC with only 832 of the 34,567 dwellings it had taken over in New York. Nearly half the houses it now owns are in this State, and their capitalized value amounts to \$6,321,606 out of the \$11,407,000 for the national holdings of 1,935 houses.

LIQUIDATION AT 55% MARK

Liquidation of the \$509,918,504 in advances made on 80,115 dwellings in New York has reached 55 per cent. In the nation the total loans and investments have been reduced from \$3,489,000,000 to \$1,103,000,000, or by 68.4 per cent.

At the beginning of this year the HOLC had only 1,935 foreclosed homes on its hands, compared with 13,504 at the beginning of 1944. It has sold 99 per cent of the 195,970 dwellings that it took through mortgage defaults.

The foreclosures in the nation involved less than 20 per cent of the 1,017,821 original losses, compared with 42 per cent in this State. More than one-sixth of the foreclosures involved New York properties.

Book losses running into 'many millions' have been sustained in foreclosures and subsequent re-sales in this State as well as in some other parts of the nation, but these losses have been offset in part by income from interest on loans and rents. Foreclosure acquisitions now have virtually ceased.

Besides HOLC's advances to mortgage holders in taking over more than a million loans, the agency absorbed and charged off more than \$58,000,000 in loan-making costs and disbursed about \$704,000,000 in advances for borrowers' accounts and other expenses on its investments.

These charges included \$484,000,000 in taxes, \$202,000,000 for repairs and reconditioning of foreclosed dwellings, and \$18,000,000 for insurance on these properties.

FULL REPAYMENT FORECAST

'Notwithstanding these extraordinary disbursements in addition to the amount of the old mortgages refinanced by the corporation, projections of the trend of HOLC operations indicate that the corporation's future net income, after operating expenses, should be sufficient to wipe out all accumulated losses and thus enable HOLC to pay back its entire original capital of \$200,000,000 to the United States Treasury with no expense to the taxpayers,' Mr. Fahoy said.

During the past year, he explained, HOLC principal collections reached a new high mark of \$300,000,000.

The \$230,000,000 still on the HOLC books in New York State at the end of 1944 represented the accounts of 66,197 borrowers and \$6,321,606 in capitalized value of the 832 houses it still owned. More than 54,000 debtors were reported to be making payments on schedule and 10,517 were less than three months in arrears on payments."

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IN THE

Supreme Court of the United States

October Term, 1944

No. **127** **62**

THE EAST NEW YORK SAVINGS BANK,

Appellant,

against

ALVIN HAHN and HANNAH HAHN, his wife,

Appellees.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM AMICUS CURIAE

NATHANIEL L. GOLDSTEIN,

*Attorney-General of the
State of New York.*

ORRIN G. JUDD,

Solicitor General,

HERBERT A. EINHORN,

Assistant Attorney-General,

of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1944

No. 1174.

THE EAST NEW YORK SAVINGS BANK,
Appellant,
against

ALVIN HAHN and HANNAH HAHN, his wife,
Appellees.

**STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM
AMICUS CURIAE**

*To the Honorable the Chief Justice and Associate Justices
of the United States Supreme Court:*

Now comes the Attorney-General of the State of New York, having been directed by the Court of Appeals of the State of New York to appear in that court, pursuant to the provisions of § 68 of the New York Executive Law, for the purpose of defending the constitutionality of Chapter 93 of New York Session Laws of 1943, and files his statement, as *amicus curiae* in opposition to appellant's Statement as to Jurisdiction, and moves that the appeal herein be dismissed, or that the order and judgment appealed from be

Jurisdiction

The protection of the contract and due process clauses of the Federal Constitution (Art. I, § 10; 14th Amendt. § 1) having been duly invoked below, the question of jurisdiction of this court depends upon whether any substantial ground exists in the record for claiming the protection of those clauses.

The constitutionality, under emergency conditions which demand such relief, of statutes interfering with a mortgagee's right of foreclosure has been upheld by this court in *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, which was followed by the New York Court of Appeals in *Loporto v. Druiss Company, Inc.*, 268 N. Y. 699; and *Maguire & Co. v. Lent*, 277 N. Y. 694 (upholding New York mortgage moratorium statutes without any provision for amortization).

The New York statute here under attack (L. 1943, c. 93, amending C. P. A. § 1077-g) suspends the right of foreclosure for principal defaults, on condition that the owner pay the unpaid principal amount at the rate of 1% per annum (increased to 2% in 1944—L. 1944, c. 562). Interest, taxes and insurance must also be paid currently by the mortgagor in order to avoid foreclosure, and they have been so paid by the appellees herein, as appellant concedes.

The sole question involved is, therefore, whether the New York Legislature in March, 1943 properly determined that there were such facts as to justify either a finding of the continuance of the emergency which led to the original passage of the mortgage moratorium legislation (Chapter 793 of the Laws of 1933) or a finding of the existence of a new emergency, arising from war conditions, and calling for a modified continuance of the moratorium.

We submit that appellant's contentions are so unsubstantial as not to need argument before this court, but on the contrary to warrant this court in disposing of the appeal at this stage.

Opinions Below.

Opinions of the courts below are reported as *East New York Savings Bank v. Hahn, et al.*, in 182 Misc. 863, 51 N. Y. S. (2d) 496 (Sup. Ct., Kings Co., Fennelly, J., July 31, 1944), affirmed, 293 N. Y. 622 (Ct. App., December 30, 1944).

The trial court, on the issue of the existence of conditions justifying the legislation, and limiting itself to the first alternative stated above, said:

"The mortgage market is, of course, inseparably connected with the real estate market. Testimony was submitted by plaintiff that can well be credited, that the real estate market in 1943 was active and gave indications of being more active in 1944. The testimony shows, and it is a matter of common knowledge, that much foreclosed institutional real estate has been liquidated. For the purpose of collecting and distributing mortgage and real estate information to the savings banks supporting the service, New York State is divided into groups. Group 5 embraces Long Island and Staten Island. The chief statistician of this group prepared figures showing real estate holdings of this group that resulted from mortgage investments. The figures show that member banks in Brooklyn had an overhang of real estate as of the end of 1939 of \$49,360,469; and as of January 1, 1944, of \$17,105,680. In Queens the figures were at the end of 1939, \$9,808,417; and as of January 1, 1944, \$3,857,742. In Nassau the figures were at the end of 1939, \$2,487,143; and as of January 1, 1944, \$495,952. There is still to be liquidated, and was at the time of the commencement of this action, a considerable amount of real estate held by savings banks, insurance companies, Home

Owners' Loan Corporation and the trustees of estates. Not until the holdings of these unwilling owners of real estate have been reduced, so that they are no longer a factor in competition with the real estate of those who willingly acquired real estate and are willing but not forced to sell, can it be said that there is a normal real estate market.

"The Legislature had the right, in its judgment, to determine that abnormal deflation of real property values, in view of these circumstances, existed at the time it enacted the renewal legislation of 1943. This was one of the reasons upon which the original moratorium legislation of 1933 was based. The emergency, in the court's opinion, still existed at the time this action was commenced." (at pp. 864-65 of 182 Misc.)

The Attorney-General was not given notice of the constitutional issues in the trial court.

Upon a direct appeal to the Court of Appeals, additional facts and statistical data within the realm of judicial knowledge were submitted for its consideration. These indicated the direct and inevitable effect on the real estate and mortgage market of the national war emergency with its attendant factors, such as rent and wage ceilings on the one hand and rising individual and corporate taxes and costs of maintenance on the other. Moreover, reference was made to the message of the Governor to the 1943 State Legislature reciting the existence of these new emergency factors (1943 Leg. Doc. No. 1, p. 9), and also to the report of a Joint Legislative Committee on the mortgage moratorium, made in 1942 after an exhaustive study into the existing facts and the increasing effect of the war economy on the general situation (1942 Leg. Doc. No. 45). The plaintiff agreed in the Court of Appeals that this report should be considered as part of the record in this case. Accordingly a copy is being filed with these motion papers.

With all these facts before it the Court of Appeals found that the 1943 enactment of the New York State Legislature was, as a matter of fact, justified, saying (p. 628):

"Doubtless such a judicial inquiry would disclose that many—perhaps all—of the adverse conditions created by the 'abnormal disruption in economic processes' which, as the Legislature found, existed in 1933 and resulted in a 'public emergency,' disappeared before 1943. The Legislature did not, in 1943, find that these conditions still existed. It found only that the 'serious public emergency' existing in 1933 and 'resulting' from these conditions, still existed. In 1943 the fact that payrolls and savings bank deposits had increased in almost unprecedented degree was a matter of common knowledge. The Legislature could not ignore the great changes in the economic situation. On the other hand, an accumulation of past due mortgages resulting from the ten-year-old ban upon actions to foreclose mortgages for default in the payment of principal might reasonably cause apprehension that a flood of foreclosure actions would follow removal of the ban and might itself justify a statute reasonably calculated to stem the impending flood. Reports which legislative committees made to the Legislature in 1938 and 1943 as well as a message of the Governor called to the attention of the Legislature also the fact that abnormal conditions incident to a war economy or resulting from other causes might still constitute a threat 'to the welfare, comfort and safety of the people of the state' and might call for the exercise of the legislative power to provide an extraordinary remedy for extraordinary conditions.

"The presumption is that the Legislature 'inquired and found' that under the conditions then disclosed there was need for a continuance of the suspension of the right of holders of bonds and mortgages to foreclose for default in the payment of the principal. (Szold v. Outlet Embroidery Supply Co., 274 N. Y. 271, 278). It is entirely unimportant whether the conditions then existing have created a new emergency, as said by the Governor in his message, or have, as the Legislature said, resulted in the continuance of an emergency it-

self created by conditions which have run their course. The question which the court must decide is whether the Legislature in the challenged statute has provided an appropriate remedy to tide over an exigency resulting from present conditions. We have said in an analogous case that: 'Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the exercise of the reserved power of the state and whether the remedy adopted by the state is reasonable and legitimate.' (Matter of People [Tit. & Mtge. Guar. Co.], *supra*,* p. 94). We conclude that the challenged statute meets that test." (Italics the court's.)

These determinations of both the New York courts as to the continuance of the emergency or the development of a new emergency, are both based upon findings of fact, which we submit this court should accept, namely, the cumulative effect of war emergency conditions, with their attendant circumstances mentioned above, upon a pre-existing deflated real estate and mortgage market, and the dangers inherent in an abrupt termination of the moratorium, which might cause a disastrous flood of foreclosures.

Facts and Argument Supporting Decision Below

Among the supporting facts which underlie these findings are the statement of the Joint Legislative Committee in 1942, that the amount of outstanding mortgages still within the protection of the mortgage moratorium laws was approximately five billion dollars (1942 Leg. Doc. No. 45, p. 15); the fact that many thousands of persons were employed on a fixed salary, or were dependent upon fixed retirement income, and unable to pay their entire mortgage indebtedness immediately, especially under the impact of increased cost of living and increased taxes (*id.* 19-22); the further

* 264 N. Y. 69.

fact that the allegedly active real estate market of 1943 involved sales for an average consideration of only approximately 63% of the assessed value of the property (Members' News Bulletin of Real Estate Board of New York for Feb. 1944); and the further fact that official figures from various sources showed over half a billion dollars of involuntarily acquired real estate still in the hands of financial institutions and investors. Obviously a bill which permitted immediate foreclosure of all the outstanding moratorium-protected mortgages might cause a disastrous break in the already depressed real estate market.

The State Legislature may properly be presumed to have considered these factors in enacting Chapter 93 of the Laws of 1943, even in the absence of its exhaustive joint legislative investigation. (*Townsend v. Yeomans*, 301 U. S. 441, 451-452; *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 594.) As this court said in *United States v. Carolene Products Co.*, 304 U. S. 144 (at p. 154):

"But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it."

The conditions justifying the continuance of legislation need not be the same as those which called for its original enactment (*Biddles, Inc. v. Enright*, 239 N. Y. 354).

Appellant predicates its right to this appeal and this court's jurisdiction upon *Chastleton Corp. v. Sinclair*, 264 U. S. 543, which determined that if the facts which originally supported emergency legislation shall have ceased, then the continued constitutionality of such legislation may be brought into question and subject to further judicial inquiry. In that case Mr. Justice Holmes, who wrote the

opinion, referred to facts within the judicial knowledge of the court to support his ruling (p. 548); by the same principle, where the facts justifying the statute are matter within judicial knowledge, this court need not accept jurisdiction to review them further.

The plaintiff in the court below cited decisions in other states which have held that mortgage moratorium laws were no longer constitutional. It is sufficient answer to those cases, if they be invoked in opposition to this motion, that none of them considered a state of facts such as was found to exist in New York in 1943, and that none of them involved a statute such as the New York moratorium law here attacked (L. 1943, c. 93), which requires a definite amortization of principal as well as payment of interest and taxes in order to retain the benefits of the statute.

Here the legislation has been based upon findings of war factors already accepted as conclusive by not only the Legislature (the joint legislative investigating committee's report), but also by both other branches of government, the executive (the Governor's annual message to the Legislature), and the judiciary (the opinions of both of the lower courts). We respectfully submit that this court should not undertake to upset this concurrent finding of fact, especially when it is supported by matters within the scope of judicial knowledge.

Motion to Dismiss or Affirm.

The motion to dismiss or affirm is made upon the ground that questions upon which jurisdiction is asserted are so insubstantial as not to need further argument. The *Chastleton* case, *supra*, merely asserted that the trial court had and ought to exercise the power (which it had refused to exercise), of making findings of fact as to the continuance of the

emergency necessary to support the legislation in question. It did not hold, nor has any authority been found, which asserts that this court must assume jurisdiction to determine, in any and all cases where an appellant seeks to continue litigation, by further appeal, the factual question of the continuance of an emergency, when such question has been determined in the affirmative by both the lower and highest court of a state (cf. *Bodkin v. Edwards*, 255 U. S. 221, 223; *Thomas v. Kansas City Southern Ry. Co.*, 261 U. S. 481).

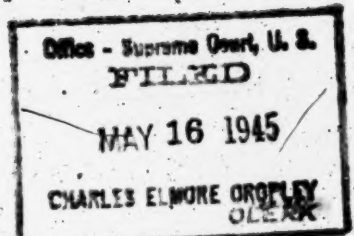
The appeal should be dismissed or the judgment appealed from affirmed.

Dated, March 22, 1945.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State
of New York,
 The Capitol, Albany, N. Y.

ORRIN G. JUDD,
Solicitor General,
 HERBERT A. EINHORN,
Assistant Attorney-General,
of Counsel.

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER, 1944, TERM.

No. 174

62

THE EAST NEW YORK SAVINGS BANK,

against

ALVIN HAHN and HANNAH HAHN, his wife,

Appellant,

Appellees.

BRIEF ON BEHALF OF
THE SAVINGS BANKS ASSOCIATION
OF THE STATE OF NEW YORK
AS AMICUS CURIAE

GEORGE R. FEARON,
Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER 1944 TERM

No. 1174

THE EAST NEW YORK SAVINGS BANK,

Appellant,

against

ALVIN HAHN and HANNAH HAHN, his wife,

Appellees.

BRIEF ON BEHALF OF THE SAVINGS BANKS ASSO- CIATION OF THE STATE OF NEW YORK, AMICUS CURIAE, IN SUPPORT OF REVERSAL AND JUDGMENT FOR PLAINTIFF

STATEMENT

This action tests the constitutionality of the Mortgage Moratorium Law of New York State, Chapter 93 of the Laws of 1943.

This brief is filed by The Savings Banks Association of the State of New York as *amicus curiae* with the consent of both parties to this action.

Said Association is composed of the individual savings banks of the State of New York. Substantially all of said savings banks have mortgages which are subject to or affected by the Mortgage Moratorium Law (Ch. 93 of the Laws of 1943). Said Association and its member banks believe that the emergency which justified the original

Mortgage Moratorium Law in 1933 has long since passed and that Chapter 93 of the Laws of 1943 which continued the moratorium is unconstitutional in that it impairs the contractual rights of an owner of a mortgage and in that it denies to an owner of a mortgage other than a Savings and Loan Association the equal protection of the law. The decision in this case will affect all of the savings banks in the State of New York.

For the reasons stated, The Savings Banks Association of the State of New York is interested in the reversal of the judgment appealed from.

We will endeavor to avoid duplication of appellant's argument. We do, however, desire to stress the fact that on the undisputed evidence in the instant case it is clearly established that the emergency which caused the enactment of the Moratorium Law of 1933 was not "still existing" on March 11, 1943, when Chapter 93 of the Laws of 1943 was passed.

We also desire to call the Court's attention to the fact that the most recent legislative investigation with respect to the mortgage situation was made in 1937 by the Nunan Commission, whose report was submitted to the Legislature on January 30, 1938 (Legislative Document (1938) No. 58), and the so-called Janes Committee Report submitted to the Legislature on February 24, 1942 (Legislative Document (1942) No. 45).

The Nunan Committee was appointed pursuant to a joint resolution and the pertinent parts of the resolution are as follows:

"Whereas, The Legislature heretofore declared that an emergency existed by reason of which a

moratorium on actions to foreclose mortgages on real property and in relation to the entry of deficiency judgments in such actions was necessary and such moratorium has been established and is now in effect; and

"Whereas, Such emergency still exists but at some future date may no longer exist; and

"Whereas, It would appear to be to the interest of all concerned that a desirable method be evolved in order that at some future date there may be no abrupt termination of such moratorium; now, therefore, be it

"Resolved (if the Assembly concur), that a joint legislative committee be, and it is hereby created, to consist of three Senators to be appointed by the Temporary President of the Senate, and three members of the Assembly to be appointed by the Speaker of the Assembly to investigate and make a thorough study of the effect of the existing moratorium on actions to foreclose mortgages on real property and the entry of deficiency judgments in such actions, including the most desirable method by which such moratorium may be terminated without causing hardship to property owners and without adversely affecting the present real estate market, and to study also the advisability and feasibility of abolishing deficiency judgments on bonds or other evidence of indebtedness secured by mortgages on real property in the state." (Legislative Document (1938) No. 58, p. 3.)

It is to be noted that in the resolution the Legislature recited that the original emergency still exists and did not leave that question to the Committee for investigation.

The Janes Committee was appointed pursuant to a joint resolution of the Legislature adopted at the 1941 session, the pertinent parts of which are as follows:

"Whereas, The Legislature heretofore declared that an emergency existed by reason of which a moratorium on actions to foreclose mortgages on real property and in relation to the entry of deficiency judgments in such actions was necessary and such moratorium has been established and is now in effect; and

"Whereas, Such emergency still exists but at some future date may no longer exist; and

"Whereas, It would appear to be to the interest of all concerned that a desirable method be evolved in order that at some future date there may be no abrupt termination of such moratorium; now, therefore, be it

"Resolved (if the Assembly concur), that a joint legislative committee be, and it is hereby created to consist of three Senators to be appointed by the Temporary President of the Senate, and three members of the Assembly to be appointed by the Speaker of the Assembly to investigate and make a thorough factual study of the effect of the existing moratorium on actions to foreclose mortgages on real property and the entry of deficiency judgments in such actions, including the most desirable method by which such moratorium may be terminated without causing hardship to property owners and without adversely affecting the present real estate market, and to study also the advisability and feasibility of abolishing deficiency judgments on bonds or other evidence of indebtedness secured by mortgages on real property in the state."
(Legislative Document (1942) No. 45, p. 42.)

It will again be noted that the Legislature declared that the original emergency existed and did not leave that question open to the Janes Committee.

While it is true that the so-called Janes Committee report submitted on February 24, 1942, contained the following finding:

"(1) That the emergency still exists * * *"
the rule is well settled in the New York State Legislature that:

"Select committees are charged with their peculiar duties, when appointed, and cannot go beyond the line marked out for them. (Italics supplied.) (Clerk's Manual of Rules, etc., for Regulation of Business of Senate and Assembly, State of New York, page 498, 1944 Edition.)"

Attention should be called also to the fact that the so-called report was signed by only three of the six appointed members of the Committee and that none of the five ex officio members signed the report. (See pages 3 and 41 of Legislative Document (1942) No. 45.) It was therefore an expression of the opinion of but three out of eleven members of the Committee, or, if the ex officio members are disregarded, it was the expression of opinion of but three out of six members of the Committee.

Under parliamentary rules, a majority of a Committee is required to make a report. Under the Senate Rule 7, a report may be made by a majority of any Committee, or by six members of any Committee with the Chairman voting therefor and less than six members opposed. (Clerk's Manual of Rules, etc. (1944), page 42.)

The Journal of the Proceedings of the Senate for February 24, 1942 (page 432, Senate Journal, 1942), contains the following:

"By unanimous consent Mr. Janes submitted the report of the Special Joint Legislative Committee on Mortgage Moratorium and Deficiency Judgments, signed by the Chairman and only two members of the Committee, which was ordered printed and referred to the Committee on Mortgages and Real Estate."

Nowhere does it appear that the report was ever adopted.

Consequently, although the document states:

"The Committee finds:

"(1) That the emergency still exists * * *"

the fact of the matter is that the Committee as such never made any report and that the most that can be said is that one member of the Senate and two members of the Assembly made such a statement, notwithstanding the fact that they had never been authorized or directed to inquire into that matter. 6

The foregoing is called to the Court's attention so that it will not be misled into believing that the declaration of an emergency contained in Section 1 of Chapter 93 of the Laws of 1943 was based upon an inquiry and report by a legislative committee as to whether or not such an emergency did in fact exist.

We believe it is a fair statement to say that the Legislature has never at any time subsequent to the adoption of the original moratorium law in 1933 and prior to the adoption of Chapter 93 of the Laws of 1943 conducted any study

by any legislative committee for the purpose of determining whether or not an emergency *then existed*. The Legislature has had a bear by the tail and has been trying to find a way to let go. It has been concerned with the possible political repercussions as much as with the economic aspects of the matter.

However, if the so-called Janes report should be considered by the Court as part of the record in the case, The Savings Banks Association of the State of New York desires to call the Court's attention to certain statements it contains which tend to establish that the public emergency existing in 1933 no longer existed when the Legislature enacted Chapter 93 of the Laws of 1943.

(See Legislative Document (1942) No. 45.)

"The Mortgage Moratorium legislation was originally enacted and its continuation can be justified only by reason of the existence of a public emergency."
(p. 16.)

" * * *

"In 1933 mortgage foreclosures throughout the country were at the highest point in over fifty years. The general business index, factory employment, and the factory payrolls were at or near their lowest point, and every community was staggering under the burden of unemployment. These were some of the outstanding features of the economic emergency at that time. * * *
(p. 16.)

"In many respects general business conditions have improved through the stimulus of the defense program.

"According to the figures submitted to the committee by the State Department of Labor, the index of factory employment in August, 1933, was 65.7. * * *

"The composite index of business in the city of Buffalo, prepared by the Chamber of Commerce in that city, stood at 80.9 in August, 1933, and in July, 1941, it had reached 142.1, an increase of 75 per cent. Employment in a selected group of 130 of Buffalo's largest industrial plants showed an average total number of employees in 1933 of 32,016 and in August, 1941, of 77,950. Payrolls of these same plants increased from a weekly average of \$710,492 in 1933 to \$2,910,844 in August, 1941.

"According to figures submitted by the Rochester Chamber of Commerce, the Rochester business index increased 75 per cent between August, 1933, and August, 1941. During this same period the factory employment index increased 84 per cent. The factory payroll index increased 192 per cent. Average weekly factory earnings increased 58 per cent and composite employment in that city showed an increase of 65 per cent.

"According to charts and figures compiled by the Syracuse Chamber of Commerce, the average industrial wage in that city in August, 1933, was \$22.19, and in August, 1940, it was \$28.59. In November, 1941, payrolls showed a further increase of 46.92 per cent over the figures for the corresponding date in 1940. New car registrations in Onondaga County increased from 4,847 in 1933 to 9,789 in 1940. Bank clearings increased from \$161,292,630 in 1933 to \$252,517,598 in 1940.

"The comparative figures from Rochester, Buffalo and Syracuse are probably typical of the business stimulus in those communities which have benefited by a great volume of defense business.

"Another indication of the general improvement in business conditions may be found in the figures indicating the percentage of tax delinquencies in the cities and villages of the State. (pp. 16-17.)

"* * *

"Records of employment, payrolls, average earnings, business indices, and tax delinquencies clearly point to an improvement in economic conditions since 1933. (p. 19.)

"* * *

"Although there has been a marked increase in living costs, such costs today are substantially lower than during the World War and the postwar period. (p. 21.)

"* * *

"Many of the mortgages dated prior to July 1, 1932, were placed during the boom period in real estate. Market values have fallen and much of this property is today worth less than the face amount of the mortgage by which it is encumbered. The experience of the financial institutions in regard to the properties taken over and sold by them fully support this conclusion. It is also apparent that much of this property is unable to produce an income sufficient to meet carrying charges. (p. 24.)

"* * *

"Consideration should be given to the probable real estate trends of the next few years. Real Estate Analysts, Inc., have prepared a chart showing the cycles of real estate booms and depressions from 1800 to 1940. This chart indicates that booms and depressions in real estate follow one another with considerable regularity. Experience has indicated that there is a cycle of approximately eighteen years between the crest of one boom period and another with an intervening period of depression.

"According to this chart real estate entered a depression period at the beginning of 1930 and should have emerged from such depression about 1938 or 1939. It was not, however, until 1940 that real estate passed above the normal level. *By December 1, 1941, it was nearly 20 per cent above normal.* (p. 27.)

"* * *

"In the spring of 1941 an action was brought in Queens County to foreclose a moratorium mortgage where there was a default only in the payment of principal. The complaint in the action referred to the moratorium laws and then proceeded to set forth many facts indicating that the emergency had expired and that the moratorium laws be declared unconstitutional for this reason and that foreclosure of the mortgage be permitted. A motion to dismiss the complaint was denied, on which motion an opinion was written by the Court holding that the complaint stated a good cause of action and that if the plaintiff was able to prove the facts alleged in the complaint the moratorium laws would be unconstitutional because of the expiration of the emergency. (*Kaelin v. Michelson*, 176 Misc. 536, Special Terms, Queens County, March 26, 1941.)

"The committee is informed that this suit was never brought to trial owing to the death of the plaintiff.

"The Kaelin case suggests the very real possibility that the courts may make a finding that no emergency exists which will render all of the moratorium legislation unconstitutional and leave the property owners without any protection.

"This possibility together with the present business stimulus provided by the defense program and the war, with the corresponding improvement in the real estate market, all point clearly to the fact that we must now squarely face the problems presented by the moratorium and attempt to find an equitable solution." (pp. 27-28.)

The document further states:

"The purpose of the moratorium was to protect the home owner. That purpose can no longer be achieved by a mere continuation of the law. There must be reasonable amortization plus a reasonable rate of interest." (p. 36.)

and

"(2) That conditions generally in real estate have improved and the curtailment of building during the war seems likely to further increase values. That some permanent solution of the moratorium problem should now be made before we pass from the period of war stimulated business activity into a possible period of serious postwar depression." (p. 5.)

Examination of the document as a whole would indicate that the Committee was concerned primarily with the

problem of tapering off the mortgage moratorium rather than with determining whether or not the emergency which existed in 1933 still existed. Some members of the Committee apparently arrived at the conclusion that the proper method of tapering off was through amortization. (See Findings, p. 6, and Recommendations, pp. 7-8, Legislative Document (1942) No. 45.)

So far as appears from Legislative Document (1942) No. 45, very little of the evidence which was presented by the plaintiff upon the trial of this case was considered by the Janes Committee, and most certainly the Committee did not take into consideration the historical evidence and data to which the Court's attention is called on pages 17 to 25 of appellant's brief in this Court, and of which we ask this Court to take judicial notice. (*Chastleton Corp. v. Sinclair*, 264 U. S. 543.)

POINT I

Chapter 93 of the Laws of 1943 violates the contract clause of the Federal Constitution.

The Legislature of the State of New York declared in Chapter 793 of the Laws of 1933 that

"a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the

enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination."

In passing upon the constitutionality of this statute, the Court of Appeals said in *Klinke v. Samuels*, 264 N. Y. 144, page 149:

"As to the constitutionality of these provisions we must remember that the limitation upon the remedy in both or all instances is until July 1, 1934. There being no market for real estate of any kind, and the banks refusing to loan money on the best of real estate security, owners were caught, as it were, in a trap due to conditions over which no one had control and for which no relief was at hand. Value was in the property but the value could not be obtained nor anything like it. To prevent worse and more extensive evils and suffering, the Legislature had asked through these laws, for security holders to wait a reasonable time for universal economic conditions to improve, provided interest and taxes are paid.

"After next July all remedies, so far as these present laws apply, will again be open to the mortgage creditors.

"That such legislation, reasonably seeking only temporary relief, is not unconstitutional, we may refer to our recent decision in *Matter of People (Title & Mortgage Guarantee Co. of Buffalo)* (264 N. Y. 69), and *Home Building & Loan Assn. v. Blaisdell* (290 U. S. 398)."

It is clear that the economic factors existing in 1933 which the Legislature found warranted the mortgage mora-

torium legislation of that year no longer existed in 1943. (See dissenting opinion by Lewis, J., in *East New York Savings Bank v. Hahn*, 293 N. Y. 622, 631-634.)

In 1943 there was an active real estate market. One and two-family houses were scarce. They brought very good prices which represented the sound intrinsic values of the property. Those prices represented the amount a willing seller could procure from a willing buyer without any compulsion on either side unless it was on the buyer's part (Fols. 311-312). Mortgage loans were readily available on one and two-family dwellings from 60% to 80% of appraised values (Fol. 313).

Bank deposits had greatly increased, as had money in circulation. Weekly payrolls as well as the number of wage earners in the state had sky-rocketed. Department store sales showed large increases, and the investment by individuals in Series E war bonds in 1943 amounted to \$81.00 per capita in New York State as against \$65.10 per capita in the country at large (Fols. 111-136).

As of January 1st, 1944, the savings banks had available for mortgage lending under the law a sum in excess of a billion dollars and had taken about a hundred million dollars in mortgages in Pennsylvania, New Jersey and Connecticut and paid premiums on these loans in order to get their money invested (Fols. 146, 155-156). Real estate held by savings banks has been consistently declining; foreclosures have been declining, and new mortgage loans were greatly on the increase up until 1941 when building construction was necessarily curtailed (Ex. 6. p. 141).

In October, 1941, vacancies in apartment houses of nine stories and over were 11.1% ; in February, 1944, they were

1%. In October, 1941, vacancies in six-story elevator apartments were 8.9% ; in February, 1944, they were 0.5%. In October, 1941, vacancies in walkup apartments were 7.6% ; in February, 1944, they were 0.8% (Ex. 12, p. 148). Tax delinquencies in New York City had decreased from a high of 26.46% in 1932 to a low of 7.76% as of June 30, 1943 (Ex. 14, p. 153).

The Savings Banks Association of the State of New York as *amicus curiae* respectfully submits:

(a). That it is clear from the testimony in the instant case that in 1943 a real estate market existed and still exists where it is possible to get out of each parcel of real property whatever value there is in it. That any mortgagor having a real equity can protect such equity by refinancing or by an adjustment of his present mortgage. That the emergency which existed in 1933 has long since passed, and that the emergency to which the Legislature referred when it enacted Chapter 93 of the Laws of 1943 did not in fact exist at that time.

(b) That if it be found that the emergency which existed in 1933 still existed in 1943 when Chapter 93 of the Laws of that year was passed, such an emergency cannot be held to be temporary in character.

If it is not temporary in character, we submit that under the decisions of the New York Court of Appeals and the United States Supreme Court the act is not constitutional. (See *Klinke v. Samuels*, 264 N. Y. 144-149; *Block v. Hirsh*, 256 U. S. 135, 157; *Home Building & Loan Association v. Blaisdell*, 209 U. S. 398, 447, par. 5; *Matter of People (Title & Mtg. Guar. Co.)* 264 N. Y. 69, 95-6.)

In *Jefferson Standard Life Ins. Co. v. Noble*, 185 Miss. 360; 188 So. 289, the Court said:

"In the consideration of this case and its solution, we have not discussed the depression except as it may be related to a public emergency. The economic depression may be with us continuously as our normal status, but what we have said is that a public emergency cannot be said to have existed in 1938, nor does it exist now. It may be that the thing which was at one time considered extraordinary has now become ordinary. We do not say that economic conditions are normal. We doubt if expert economists can fix with reasonable certainty a financial and economic standard.

"Public emergency as herein referred to must of necessity be temporary in character. An economic depression may not be temporary. The exercise of the police power of the state may not be exerted simply because of such a depression, although it may be a prime factor in thrusting a public emergency upon a commonwealth."

The operation of the Moratorium Law of 1933 could not validly outlast the emergency which prompted its enactment. It could not be so extended as to suspend the contract rights of the mortgagee beyond that emergency.

Home Bldg. & Loan Association vs. Blaisdell, 290 U. S. 398, 442.

"A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."

Chastleton Corp. v. Sinclair, 264 U. S. 543, 547-8.

POINT II

Chapter 93 of the Laws of 1943 violates the equal protection clause of the Federal Constitution.

The effect of Chapter 93 of the Laws of 1943 (Mortgage Moratorium Act) is to prevent the foreclosure of any mortgage, dated prior to June 1, 1932, held by any person, firm, corporation or association other than a savings and loan association, on account of a default in the payment of principal secured by such mortgage, provided the owner of the mortgaged premises shall pay the unpaid principal amount at the rate of one per centum per annum and shall pay the taxes on said premises and the interest on said mortgage.

The act, however, specifically provides that the foregoing provisions applicable to mortgages owned by saving banks and others in New York State

“shall not apply * * * to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, * * * nor to any obligations in connection with or secured by such mortgages.” (Section 1077-g of Civil Practice Act as amended by Ch. 93 of Laws of 1943.)

Section 1 of the Fourteenth Amendment to the Federal Constitution provides in part:

“nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The Court of Appeals of New York State has held that a savings bank

"has neither capital nor shareholders, and its only resources are the moneys of depositors and the income which may be received from investments. The bank, necessarily from the statutory provisions, must be deemed to hold what property it has for the benefit of depositors only. It manages the same through its trustees and officers, and under no circumstances, and in no event, does it, or do its trustees, acquire any interest therein." (*People ex rel. Newburgh Savings Bank vs. Peck*, 157 N. Y. 51, 56.)

Savings banks in New York are organized under Article VI of the Banking Law, Chapter 2 of the Consolidated Laws of the State of New York, primarily for the protection of small depositors.

A savings bank may invest in the following property and securities, and no others:

... * *

"6. Bonds and mortgages on improved and unencumbered real property in this state, as provided in this subdivision.

"(a) A savings bank may invest (1) to an amount not exceeding sixty per centum of the appraised value of any such real property; or, (2) to an amount not exceeding sixty-six and two-thirds per centum of the appraised value thereof if such real property is improved by a building or buildings, the major portion of which is used, or in the case of a building under construction is to be used, for non-transient residential purposes.

“* * *” (Section 235, Banking Law.)

There is nothing in Section 235 of the Banking Law which interferes with said mortgage being payable in monthly installments over a period of more than ten years from the time of the making of the loan.

Savings and loan institutions are organized and exist by virtue of the provisions of Article X of the Banking Law (Chapter 2 of the Consolidated Laws of the State of New York). The Court of Appeals has said:

“The evident purpose of the law is to authorize the formation of these corporations, mainly for the benefit of wage earners and other people of limited means, to enable them to acquire homes and to accumulate their savings, * * *” (*People ex rel. Fairchild v. Preston*, 140 N. Y. 549, 552.)

A savings and loan association having funds in excess of the amount needed for loans to its members may loan

“(b) Upon bonds and mortgages upon real estate: (1) situated in this state, to the extent of sixty per centum of the appraised value thereof, if such real estate has a building thereon suitable for residential, business, manufacturing or agricultural purposes, or to the extent of sixty-six and two-thirds per centum of the appraised value thereof, if such real estate is improved by a building or buildings, all or the major portion of which is used, or in the case of a building under construction is to be used, for non-transient residential purposes.” (Section 380, Banking Law, subd. 3(b).)

There is nothing in Section 380 of the Banking Law which interferes with said mortgage being payable in monthly installments over a period of more than ten years from the time of the making of the loan.

It is the contention of the *amicus curiae* that there is no such difference between a mortgage described in Section 235, subd. 6 (a) of the Banking Law relating to the investments of savings banks and a mortgage described in Section 380, subd. 3 (b) of the Banking Law relating to investments of savings and loan associations where both mortgages are payable in monthly installments over a period of more than ten years from the time of the making of the loan, which will justify a law (Chapter 93 of the Laws of 1943) which denies to a savings bank the right to compel the payment of a past due loan secured by said mortgage but at the same time permits a savings and loan association to enforce the payment of a past due loan secured by a similar mortgage.

The Civil Practice Act, Section 1077-g, as amended by Chapter 93 of the Laws of 1943, also provides that the mortgage moratorium legislation

"shall not apply to * * * any mortgage held by a savings and loan association * * * made in accordance with the provisions of section three hundred eighty-four or three hundred eighty-five of the banking law * * * nor to any obligations in connection with or secured by said mortgage."

The above quoted section 1077-g was enacted by the Laws of 1933, Chapter 793. It has since been amended by extension each year.

Sections 384 and 385 of the Banking Law referred to are now found in Banking Law, Sections 379, 380 and 381, the former sections having been renumbered by the Laws of 1939, Chapter 341.

Former Section 384 of the Banking Law was derived from the Laws of 1914, Chapter 369, Section 384. At that time Section 384 of the Banking Law provided as follows:

"Subject to the provisions of this article and its by-laws, any savings and loan association may invest the funds received by it as follows:

"* * *

"4. If at any time it has funds in excess of the amount needed for loans to its members and the payment of matured shares and withdrawals: * * *

"(b) In securities which are authorized as investments for savings banks in section two hundred thirty-nine of this chapter.

"(c) In bonds and mortgages on unencumbered real estate situated in the state of New Jersey to the extent of sixty per centum of the value thereof; provided that the real estate is 'improved' as such term is defined in subdivision five of section three hundred eighty-six of this article and is located within fifty miles of the place of business of such association."

Section 239 above referred to in (b) provided:

"A savings bank may invest the moneys deposited therein, the sums credited to the guaranty fund thereof and the income derived therefrom, in the following property and securities and no others, and subject to the following restrictions:

“6. Bonds and mortgages on unencumbered real property situated in this state, to the extent of sixty per centum of the appraised value thereof. * * *”

If when Chapter 93 of the Laws of 1943 was enacted the Legislature intended the reference therein to Sections 384 and 385 of the Banking Law to apply to said sections as they were in effect on August 26, 1933, the date of the enactment of the original Mortgage Moratorium Act, then the provisions of Section 384 are to be read as above.

If, on the other hand, the Legislature when it enacted Chapter 93 of the Laws of 1943 intended the reference in Section 1077-g to the provisions of Sections 384 and 385 of the Banking Law to apply to those sections as amended and recodified, we must look to Section 8 of Chapter 341 of the Laws of 1939, which reads:

“§ 8. Section three hundred eighty-four of such chapter as last amended by chapter eighty-five of the laws of nineteen hundred thirty-five is hereby renumbered section three hundred eighty and amended to read as follows:

“§ 380. POWER TO MAKE LOANS. A savings and loan association may lend its funds as hereinafter provided:

“* * *

“3. If at any time such association has funds in excess of the amount needed for loans to its members,

“(a) to other savings and loan associations;

“(b) upon bonds and mortgages upon real estate

"1) situated in this state, to the extent of sixty per centum of the appraised value thereof, if such real estate has a building thereon suitable for residential, business, manufacturing or agricultural purposes, or to the extent of sixty-six and two-thirds per centum of the appraised value thereof if such real estate is improved by a building or buildings all or the major portion of which is used, or in the case of a building under construction, is to be used for non-transient residential purposes."

Under either construction it is apparent that a mortgage on improved real estate in New York State securing a loan by a savings and loan association may be foreclosed in the event of a default in the payment of principal, notwithstanding the provisions of Sections 1077-a, 1077-b, 1077-c, 1077-cc, 1077-d, 1077-e and 1077-f of the Civil Practice Act, while a mortgage on improved real estate in New York State securing a loan by any other person, association or corporation, including savings banks, may not be foreclosed under similar circumstances because of a default occurring in the payment of principal.

Not only does Chapter 93 of the Laws of 1943 fail to afford a savings bank the equal protection of the law, but it also fails to afford such protection to an individual owner of a mortgage dated prior to June 1, 1932, as it prevents his foreclosure of such mortgage on account of a default in principal while permitting such a foreclosure with respect to mortgages owned by savings and loan associations.

In *Hartford Steam Boiler Inspection & Insurance Co., et al, v. Harrison, Insurance Commissioner*, 301 U. S. 441, at page 461, the Court said:

"The applicable principle in respect of classification has often been announced. It will suffice to quote a paragraph from *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 37, 38:

*** it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. 385, 388-399; *The Railroad Tax Cases*, 13 Fed. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Air-way Corp. v. Day*, 266 U. S. 71, 85; *Schlesinger v. Wisconsin*, 270 U. S. 230, 240. That is to say, mere difference is not enough: the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare *Martin v. District of Columbia*,

205 U. S. 135, 139; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237.'

"Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. *Borden's Co. v. Baldwin*, 293 U. S. 194, 209. They cannot stand as reasonable if they offend the plain standards of common sense. In this instance, the appellant company had been licensed to do business in the State and was entitled to equal protection in conducting that business."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, at page 560, the Court said:

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of

the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."

See also *Skinner v. Oklahoma ex rel. Williamson, Attorney General*, 316 U. S. 535; *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S. 150.

We respectfully submit that the classification contained in Chapter 93 of the Laws of 1943 is arbitrary and unreasonable and does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

CONCLUSION

The judgment of the Court of Appeals should be reversed with costs and the case remitted to the Supreme Court of the State of New York with a direction that judgment be entered in favor of the plaintiff.

Respectfully submitted,

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EXHIBIT I**CHAPTER 793, LAWS OF 1933**

An Act to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages.

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

Section 2. The civil practice act is hereby amended by inserting therein new sections, to be sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f and ten hundred seventy-seven-g, to read as follows:

Section 1077-a. Foreclosure for principal defaults suspended. During the period of the emergency as defined in section ten hundred seventy-seven-g, and notwithstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of default in the payment of principal secured by such mortgage or solely in the payment of any installment or principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act.

Section 1077-b. Actions on bonds for principal defaults suspended. No action shall be maintainable or judgment shall be entered during such emergency, upon any loan, indebtedness, bond, extension agreement, collateral bond, or other evidence of indebtedness or liability, whether or not such indebtedness or liability shall have been thereafter reduced, extended, or modified, if the indebtedness originated or was originally contracted for simultaneously with such mortgage and is secured solely by such mortgage, or upon any guaranty of payment of the principal or installment of principal of any mortgage within the scope of section ten hundred seventy-seven-a or upon a guaranty of any obligation secured by such mortgage, so long as no action or pro-

ceeding shall be maintainable to foreclose such mortgage. No action shall be maintainable or judgment be entered during such emergency upon any guaranty of payment of any share or part of any bond and/or mortgage or group of bonds and/or mortgages represented by a certificate, bond, debenture or other instrument nor upon any note, bond, debenture or other instrument being part of a series issued against, or secured by the deposit of a bond and/or mortgage or a group of bonds and/or mortgages so long as interest at the rate prescribed shall be paid upon any such certificate, note, bond, debenture or other instrument. The liability of any endorser, guarantor of, or surety for any such liability shall not be discharged by reason of the failure of the holder to demand payment of any such indebtedness or liability, or by reason of any failure to give notice of non-payment, or by reason of any failure to bring any action or proceeding thereon during the emergency.

Section 1077-c. Notice of Application. Notwithstanding the foregoing provisions, any person who would otherwise have the right to foreclose a mortgage, shall have the right to make an application to any court in which such foreclosure action might be brought upon eight days notice, served personally, or in such manner as the court may direct to the last record owner of the mortgaged property, and if upon such application it shall appear to the satisfaction of the court that the mortgaged property during the six months prior to the application shall have produced a surplus over and above the taxes, interest and all other carrying charges, then the court may make an order directing the payment of such surplus or such part thereof as the court may determine to the mortgagee to apply toward the reduction of any past due principal. In the event of default in making of such payment for thirty days after service of a

copy thereof with notice of entry thereof, then and in such event the applicant may maintain an action to foreclose such mortgage. In any such proceeding the court may enter an order permitting foreclosure without other proof if the owner of the property shall fail to make available for inspection by the mortgagee and the court all records and data available as to the income and disbursements, or if the owner shall fail to produce adequate records or data of income and disbursements.

This section shall not apply to properties used or intended to be used for farming purposes or dwellings occupied by the owner or by the owner in conjunction with not more than one other family.

Section 1077-d. Waiver against public policy. Any covenant or agreement or understanding in or in connection with or collateral to any mortgage whereby a mortgagor waives or agrees to waive the protection intended to be afforded to him by sections ten hundred seventy-seven-a and ten hundred seventy-seven-b, shall be deemed to be void as against the public policy and be wholly unenforceable.

Section 1077-e. Application to pending actions. Sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-d shall apply to any action or proceeding heretofore instituted for the foreclosure of a mortgage within the scope of this act unless the same has proceeded to final judgment directing the sale of the mortgaged premises, and any such action shall be dismissed upon payment by any defendant to the plaintiff of taxable costs and the remedying of any default other than the payment of principal or any installment of principal within thirty days after this act takes effect, but otherwise such action or proceeding may continue.

Section 1077-f. Statute of limitations not to run during emergency. Any action or proceeding within the scope of this act, which would have been maintainable at any time during the period of the emergency, shall not be barred by any provision of article two of the civil practice act during a period of one year after the termination of the emergency. This section shall not be construed to shorten the period within which any such action may be commenced.

Section 1077-g. Mortgages not affected. The provision of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of sections three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any obligations in connection with or secured by any such mortgages. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred thirty-four.

Section 3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part thereof.

Section 4. This act shall take effect immediately.

EXHIBIT II**CHAPTER 93, LAWS OF 1943**

An Act to amend chapter seven hundred eighty-two of the laws of nineteen hundred forty-one, entitled "An Act to amend the Civil Practice Act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages and to extend the mortgage moratorium and setting forth the terms and conditions of such extension," in relation to continuing the provisions thereof until July first, nineteen hundred forty-four.

Became a law March 11, 1943, with the approval of the Governor.

Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of chapter seven hundred eighty-two of the laws of nineteen hundred forty-one, entitled "An Act to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages and to extend the mortgage moratorium and setting forth the terms and conditions of such extension," is hereby amended to read as follows:

Section 1. The serious public emergency, which existed at the time of the enactment of sections ten hundred and seventy-seven-a, ten hundred and seventy-seven-b, ten hundred and seventy-seven-c, ten hundred and seventy-seven-d, ten hundred and seventy-seven-e, ten hundred and seventy-seven-f and ten hundred and seventy-seven-g of the civil

practice act, as added by chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three, and at the time of the enactment of section ten hundred and seventy-seven-cc of the civil practice act, as added by chapter eight hundred and ninety of the laws of nineteen hundred thirty-four, having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters seven hundred and ninety-three of the laws of nineteen hundred thirty-three and eight hundred and ninety of the laws of nineteen hundred thirty-four shall, notwithstanding any provision of such chapter, remain and be in full force and effect until July first, nineteen hundred forty-four, and, in conformity with such extensions, section ten hundred and seventy-seven-g of the civil practice act, as added by such chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three and last amended by chapter seven hundred and eighty-two of the laws of nineteen hundred forty-one, is hereby amended to read as follows:

Sec. 1077-g. Mortgages not affected. The provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage or the modification or extension of any mortgage insured, or hereafter insured under the provisions of the national housing act, in effect June twenty-seventh, nineteen hundred thirty-four, as said act has been or is hereafter amended from time to time or to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of sections three hundred eighty-four or three

hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any installments or amortization of principal, the payment of which is provided for by extension or modification executed on or after July first, nineteen hundred thirty-seven, nor to the mortgages so extended or modified, nor to any obligations in connection with or secured by any such mortgages. The provisions of said sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f, shall apply to the final payment of principal of the mortgages so extended or modified if all installments or amortization the payment of which is provided for by such extension or modification are made as provided for by such extension or modification.

Notwithstanding the provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, and ten hundred seventy-seven-f, and in addition, to the cases therein provided for the commencement of foreclosure actions, and not in limitation thereof, any owner or holder of a mortgage covering real property as to which there is a default in the payment of any of the principal amount thereof as provided in the instrument creating the mortgage debt or any modification or extension thereof may commence an action to foreclose such mortgage unless the owner of the mortgaged premises shall pay the unpaid principal amount thereof at the rate of one per centum per annum. Such principal payments shall accrue from July first, nineteen hundred forty-two, and shall be payable on October first, nineteen hundred and forty-two and quarterly thereafter.

In any action or proceeding for the foreclosure of a mortgage on real property or any interest therein or in any foreclosure under article seventeen of the real property law instituted by reason of default in the payment of installment or amortization the payment of which is provided for by such extension or modification, or by the terms of this section, if such action or proceeding has not proceeded to final judgment directing the sale of the mortgaged premises, then such action shall be dismissed and discontinued upon the payment by any defendant to the plaintiff of the taxable costs and disbursements, and the payments of such installment or amortization in default and the remedying of any other default under the terms of such mortgage or extension or modification. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred forty-four.

Section 2. This act shall take effect immediately.

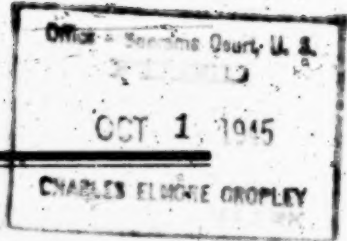
EXHIBIT III**SUPREME COURT OF THE UNITED STATES****OCTOBER, 1944, TERM****No. 1174****THE EAST NEW YORK SAVINGS BANK,***Appellant,***against****ALVIN HAHN and HANNAH HAHN, his wife,***Appellees.*

The undersigned, being respectively the attorneys for the Appellant and for the Appellees in the above entitled matter, hereby consent that a brief may be filed as *amicus curiae* by The Savings Banks Association of the State of New York.

Dated: April 26, 1945.

JOHN P. McGRATH,
Counsel for Appellant.
COLLER & COLLIER,
Counsel for Appellees.

FILE COPY



Supreme Court of the United States

October Term, 1945, No. 62.

THE EAST NEW YORK SAVINGS BANK,

Appellant,

against

ALVIN HAHN and HANNAH HAHN,

Appellees.

**APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW YORK**

**BRIEF OF THE STATE OF NEW YORK
as Amicus Curiae**

September 27, 1945.

✓ **NATHANIEL L. GOLDSTEIN,**
*Attorney General of the State
of New York.*

ORRIN G. JUDD,
Solicitor General,

**SAUL A. SHAMES,
HERBERT A. EINHORN,**
*Assistant Attorneys General,
of Counsel.*

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Supreme Court of the United States

OCTOBER TERM, 1945, No. 62.

THE EAST NEW YORK SAVINGS BANK,

Appellant,

against

ALVIN HAHN and HANNAH HAHN,

Appellees.

BRIEF OF THE STATE OF NEW YORK as *Amicus Curiae**

Statement

The appellant has appealed to this Court pursuant to U. S. Code, tit. 28, § 344 (a), from a final judgment of the Supreme Court of the State of New York, County of Kings, dated February 26, 1945, and entered upon a remittitur from the Court of Appeals of the State of New York, in an action for the foreclosure of a mortgage. Appellant (plaintiff in the foreclosure action) challenged the validity of the New York Mortgage Moratorium Law as extended in 1943 (L. 1943, c. 93), under the contract clause (Art. I, § 10) and the due process clause of the Fourteenth Amendment, of the Federal Constitution.

* The Attorney General appears not only as *amicus*, but as a statutory party pursuant to the direction of the Chief Judge of the Court of Appeals under New York Executive Law § 68 (L. 1913, c. 442). Under that statute it is the Attorney General's duty to appear in support of the constitutionality of State Laws when directed by a court of record of the State.

The trial court dismissed the complaint at the close of the plaintiff's case and sustained the constitutionality of the statute (R. 162-165). The opinion of the trial justice is reported in 182 Misc. 863, 51 N. Y. S. (2d) 496 (1944).

On a direct appeal to the Court of Appeals pursuant to New York Civil Practice Act § 588(4), the judgment of the trial court was affirmed (R. 168-172; reported in 293 N. Y. 622, 59 N. E. (2d) 625 [1944]).

Plaintiff appealed to this Court as a matter of right. Statements supporting and opposing jurisdiction, including a motion to dismiss or affirm, were duly filed. On May 21, 1945, this Court noted probable jurisdiction (R. 188).

Facts

1. *Nature of the Litigation.*

This action was instituted to foreclose a mortgage on real property. The original amount of the mortgage was \$5,000, but at the time of the commencement of the action the principal sum due had been reduced to \$4,912.50 (R. 34). Admittedly all interest, taxes, insurance and amortization payments required under existing moratorium statutes have been paid by the defendants and the only default is in the unpaid principal amount previously mentioned (App. Br. p. 2).^{*} It is also conceded that if there be a valid mortgage moratorium in the State, the mortgage in question is covered by its provisions (*ibid.*).

Appellant contests the validity of the New York Moratorium Law (L. 1943, c. 93) in existence at the time of the commencement of the action on March 27, 1944, on the ground that the emergency which justified the original enactment of the statute in 1933 (L. 1933, c. 793) has ceased

^{*} Assuming that defendants have paid statutory amortization since the date of trial, the amount of the principal will have been reduced by October 1, 1945 to \$4,762.50.

to exist, and that the 1943 law therefore works an unconstitutional impairment of the obligation of the appellant's contract with the defendants and deprives it of property without due process of law (App. Br. pp. 2, 3).

2. The Statute Involved.

The statute under attack is chapter 93 of the Laws of 1943. Section 1 of the act contains the legislative declaration of the existence of an emergency and reads in part as follows:

"The serious public emergency, which existed at the time of the enactment of sections ten hundred and seventy-seven a, * * * of the civil practice act, as added by chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three, * * * having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters * * * shall * * * remain and be in full force and effect until July first, nineteen hundred forty-four, * * *"

The 1933 and 1943 acts are set forth in full in the appendix to appellant's brief (pp. 53-61).

Briefly the 1943 statute continues to ban all actions for the foreclosure of mortgages executed before July 1, 1932, for principal defaults, on condition that the owner pay the unpaid principal amount at the rate of 1% per annum.* In other words, so long as interest, taxes, insurance and the amortization provided for by the act are paid, the mortgaged property may not be foreclosed.**

* The requirement for amortization was increased to 2% by chapter 562 of the Laws of 1944 and to 3% by chapter 378 of the Laws of 1945, each of these laws extending the moratorium for an additional year.

** If the mortgage so provides, as the one in suit does (Pl. Ex. 2, printed at R. 132, offered at R. 33), the mortgage may also be foreclosed for the owner's failure to keep the buildings on the mortgaged property in reasonably good repair. See *Mills Land Corp. v. Halstead*, 184 Misc. 679, 56 N. Y. S. (2d) 862 (1945).

The mortgagee has the right, moreover, except in the case of properties used for farming purposes, or of dwellings occupied by the owner or by the owner in conjunction with not more than one other family, to apply to the court for an order that any surplus income be applied toward the reduction of any past due principal (N. Y. C. P. A. § 1077-c). Failure by the mortgagor to make available records and data as to receipts and disbursements or to pay the amount directed by the Court under the provisions of the applicable section, operates to remove the foreclosure restriction.

The history and background of the legislation is set forth in more detail under sub-head 4, *infra*, pp. 7-14.

3. The Testimony at the Trial.

In attempting to show that no public emergency existed which justified the continuance of the Moratorium Law, appellant called four witnesses—two statisticians and two real estate men—and, in addition, introduced in evidence a number of statistical exhibits.

The substance of the testimony of the real estate men was that there was an improved condition in the real estate market in 1943 and that mortgage money was available where the underlying security was sound, provided location, tenancy and character of building were satisfactory (R. 68-69, 70-71, 103, 104).

One of these witnesses, Charles Punia, a real estate broker, based his opinions solely upon his personal experience (R. 76). The disregard of adverse factors by this witness may be judged from his testimony that in his opinion there had always been a good mortgage loan market from 1934 on,—which might indicate there never was a need of a moratorium. With such a view not even the appellant is now in accord (App. Br. p. 30).

The activities of the second real estate expert were confined primarily to the Borough of Queens (R. 104)—

the property in suit lying in the Borough of Brooklyn. He testified that the real estate market was active in 1943, and that mortgage money was readily available, provided the security was good (R. 103, 104, 108). He attributed a large part of the improvement and activity in the real estate and mortgage market to new construction in Queens County commencing around 1937, which enabled lending institutions to place their money. But obviously a good market for newly constructed homes is no criterion concerning conditions affecting moratorium mortgages, all of which were placed prior to 1932 and cover older properties. As far as mortgage defaults are concerned, he admitted that there were more foreclosures in 1942 and 1943 than there had been in 1934 (R. 99-100, 141).

Moreover the Federal Housing Administration, created under the National Housing Act (12 U. S. C. §1701 *et seq.*), played an important part in creating better market conditions by guaranteeing loans made on new residences (*id.* §1709; and see R. 111). There was no authority under the Act to insure mortgages on any properties which were constructed prior to February 3, 1938, and consequently the refinancing of older properties, which were the primary subject of protection under the moratorium law, was impossible under the National Housing Act.

One of the statistical exhibits produced by the plaintiff (Pl. Ex. 6, printed at R. 141, offered at R. 86) shows that in Brooklyn, Queens and Nassau there had been sales of real property by member banks of Group V, Mortgage Information Bureau, which in number and dollar amount exceeded foreclosures conducted by the same institutions. Even these figures, however, still show substantial foreclosures as late as 1943, the so-called "peak year" of real estate activity to which one of appellant's witnesses testified (R. 106). Moreover, these bare statistics are mean-

ingless without a showing of how the sales compared with the fair or assessed value of the properties involved, or what number of them represented moratorium protected properties. As we shall later show, the percentage of total consideration from sales in New York City as compared with assessed valuations gradually decreased from 1939 to 1943, in spite of the fact that total tax assessments in the same period had declined. It is also noteworthy that during the first ten months of 1943 savings banks in New York State reduced to possession mortgaged property amounting to \$60,348,000, whereas during the same period their total sales aggregated only \$56,821,000. (See 1943 Report of New York State Superintendent of Banks, 1944 Leg. Doc. No. 21, p. 28).

The statisticians who testified for the appellant quoted figures indicating generally an improvement in business conditions, in employment and in wages. There was testimony as to an increase in bank deposits (R. 38-40), in the amount of currency in circulation (R. 40-41), and in the sale of war bonds (R. 41-42).

It was testified that in order to reach the legally permissive maximum limit for mortgage investment, savings banks could invest \$1,100,000,000 in mortgages within the State (R. 49). However, the witnesses did not explain how the desire of the savings banks to increase their mortgage portfolios could be aided by a decision granting the right to foreclose mortgages which—like the one in suit—were paying 6% interest plus regular amortization of principal.

The Court was also requested by plaintiff's counsel to take judicial notice of Presidential and Congressional emergency measures (R. 113-121), most of which bore little or no relation to the question whether the New York State Legislature had reasonable justification for the enactment of the challenged statute.

On the trial of the action the attorney for the defendants called no witnesses, but in cross-examining the appellant's witnesses he elicited facts and figures which tended to refute many of appellant's claims. The Attorney General took no part in the trial. Although the People of the State of New York were named as defendants in the summons (R. 4), the complaint recited that they were made a party only because of their possible lien for transfer taxes on the estate of a former owner of the property (R. 9), which was revealed as a junior lien when the complaint was amended (R. 15) to set forth the facts required by statute (N. Y. C. P. A. § 259).

When the case reached the Court of Appeals, the Attorney General, at the invitation of the Chief Judge pursuant to New York Executive Law § 68, filed a brief in support of the constitutionality of the statute. In that brief the Attorney General set forth facts contained in reports of Joint Legislative Committees on Moratorium Legislation and in other official documents, and referred to other data in the field of judicial notice supporting the finding of the existence of an emergency.

It consequently may not be said that appellant's evidence was undisputed (App. Br. p. 2).

4. *Legislative History of the New York Mortgage Moratorium Statute.*

a. *The Origin of the Moratorium Law.*

The original mortgage moratorium statute in New York State was enacted in 1933 (L. 1933, c. 793). In substance, the act suspended mortgage foreclosure actions, as well as actions on the bond, for all defaults in the payment of principal on mortgages executed prior to July 1, 1932. The Legislature at that time declared the existence of a public emergency in the following words:

"Section 1. It is hereby declared that a serious public emergency, affecting and threatening the wel-

fare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation; the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed; and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination."

The constitutionality of the 1933 law was upheld by the Court of Appeals in *Klinke v. Samuels*, 264 N. Y. 144, 190 N. E. 324 (1934). Appellant does not dispute the existence of an emergency at that time "which justified the passage of the law and the temporary suspension of the contractual rights of mortgagees" (App. Br. p. 30).

In each of the eleven succeeding years (except 1942, the 1941 extension having been for two years) the Legislature declared that the provisions of the 1933 statute should remain in force for another year. The 1941 statute (L. 1941, c. 782) also provided for amortization of principal at the rate of 1% per annum from July 1, 1942 on. As already noted, the 1944 statute (L. 1944, c. 562) increased the rate of amortization to 2% and the 1945 law (L. 1945, c. 378) provided for a further increase to 3%.

In connection with the 1938 extension, the Legislature had before it a report of a joint legislative committee, appointed pursuant to a resolution of the State Legislature in 1937. This committee, known as the "Nunan Committee," made an exhaustive study of the mortgage field, held numerous public hearings and assembled volumes of statistical and other data. The report of the Nunan Committee, which found that an emergency still existed in the real estate and mortgage field requiring the continuance of the moratorium legislation, is embodied in Legis-

lative Document No. 58 for the year 1938. The Court of Appeals of the State, by its 1938 decision sustaining the constitutionality of the previous extensions of the Moratorium Law in *Maquire & Co. v. Lent & Lent*, 277 N. Y. 694, 14 N. E. (2d) 629 (1938), may, in effect, be said to have concurred in the findings of the Nunan Committee.

Again in 1941, the Legislature, by a further joint resolution, created a committee to study the conditions in the mortgage field. This committee was known as the "Janes Committee" and it rendered its report on February 24, 1942 (1942 Legislative Document No. 45).^{*} This report preceded the 1943 legislation here challenged, and the parties agree that it should be considered by the Court as part of the record in this case (see App. Br. p. 5). Because of the importance of the Janes Committee report to the issue involved, we undertake a somewhat detailed analysis of its contents.

b. The Janes Committee Report.

The report of the Janes Committee comprises seventy-nine pages and, in addition to the Committee's findings and recommendations, contains an abundance of facts and statistics showing the existence of an emergency in the New York mortgage field. The Committee sought and obtained information concerning employment, payrolls, earnings, business activity and cost of living. It obtained reports pertaining to real estate conditions. It held public hearings in various sections of the State. One of the valuable sources of its information as regards mortgages was based on questionnaires which it had prepared and sent to all State banks, trust companies, savings and loan associations, savings banks and insurance companies within the State. (Report, pp. 9-10).

^{*} Copies of the 1942 legislative committee report will be submitted to the Court at the argument.

The institutions which answered the questionnaires reported that on August 26, 1941, moratorium mortgages held by them totalled 552,000 with a total principal amount of \$3,154,751,258, as compared with a total of 658,377 mortgages in the aggregate principal amount of \$5,093,578,562.84 held by the same institutions August 26, 1933 (*id.* p. 15).

The quoted figures, it was pointed out, did not include the holdings of all lending institutions nor privately owned mortgages nor those held in a fiduciary capacity. The Committee estimated, on the basis of the data before it, that there were still close to four billion dollars of moratorium mortgages outstanding in New York State (*id.* p. 15).

After referring to the economic emergency which called forth the original enactment, the Committee stated (*id.* p. 16):

“Careful consideration should likewise be given to the effect of the repeal or sudden termination of the moratorium legislation. Care must be taken lest ill-considered action precipitate an emergency as great as that which the legislation was originally intended to alleviate.”

The Committee was, of course, aware that there had been an economic improvement over 1933. It emphasized, however, that less than one-tenth of the population of the State and less than one-sixth of its wage earners had benefited directly by improvement in employment and factory wages (*id.* p. 19). The report continued (*id.* pp. 19-20):

“On the other hand, many thousands of persons who are employed on a fixed salary such as teachers, Federal, state, and local government employees, clerical employees, and similar groups, will receive no direct benefit from the increase in factory employment. Persons who have retired and those dependent upon pensions and annuities will receive no bene-

fits, nor will to any extent the professional groups. Priority rulings and inability to get certain essential materials threaten to force many small manufacturing enterprises unable to handle government contracts, to close or greatly curtail their activities. Decreased income or unemployment may result in the case of such employees as cannot be absorbed in the defense program."

The report then noted the marked increase in living costs affecting "both those who have benefited by the defense program and those who have not" (*id.* p. 20). A significant feature pointed out by the Committee was that the only item of decrease in living costs in New York City between 1933 and 1941 was rent, which had decreased 3.5% at a time when real estate taxes had risen over 16% (*ibid.*).

Turning to a discussion of the increased tax burden, the Committee estimated that the "American taxpayer is paying 24 per cent of his income toward all forms of taxation including state, local and Federal" (*id.* p. 22). The conclusion drawn was (*ibid.*):

"that the increase in living costs and the increased tax burden which must be faced for some time to come, have to a major extent offset increased earnings due to improved business conditions."

On the subject of real estate, the Committee reported (*id.* p. 22):

"There still is much distressed real estate. The Real Estate Board of New York, Inc., reported to the committee that its investigation showed that on open market sales of real property in New York City in 1937, the average price received by the vendor was only 82.9 per cent of the assessed value of the property. In 1938 the average realized price dropped to 79.5 per cent of the assessed value. In 1939 it dropped to 75.5 per cent and in 1940 to 72.6 per cent."

The report continued (*ibid.*):

"One of the Brooklyn banks reports to the committee that in its opinion the emergency still exists, that the defense program has not improved the financial condition of the houseowner, and that in many instances he is in a worse position as a result of increased living costs."

Attention was also called to the fact that of 80,116 loans made by the Home Owners Loan Corporation, 31,829 properties covered by these loans have been repossessed and an additional 5,000 loans were more than three months in default. Slightly less than one-half of the repossessed properties have been sold, resulting in a loss of 39.4 per cent of the ledger value of the property (*id.* p. 23).

From the answers furnished by the lending institutions to the Committee's questionnaires, it appeared that there were 34,667 mortgages in total principal amount of \$537,553,361 where the owner, it was felt, was unable to pay any amortization (*id.* p. 38). Many of these owners, it was stated, no doubt have substantial equities in their property and are entitled to the continued protection of the Moratorium Law (*id.* p. 39).

The Committee then made this significant declaration (*id.* p. 25):

"Any sudden liquidation or attempted liquidation of any substantial number of the mortgages now within the protection of the moratorium would tend to generally demoralize the real estate market and result in substantial loss not only to the property owners but to depositors, beneficiaries, and others whose rights are derived from the mortgages."

And further (*ibid.*):

"The sudden termination of the legislation which has dammed up normal liquidation of these mortgages

for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate."

On the basis of its exhaustive and thorough investigation, the Committee made a series of findings (*id.* p. 5), the most material one being Finding No. 1 which states (*ibid.*):

"That the emergency still exists and that the sudden termination of the moratorium would of itself now create an emergency. Improved business and economic conditions resulting from the defense program and the war have largely been offset by the increase in living costs and the enormous and ever-increasing tax burden. The average home owner has received no relief from the burden of real estate taxes, and, on the contrary, such taxes have increased since the first adoption of the moratorium. Any present sudden termination of the moratorium might result in a very large amount of forced liquidation of mortgage indebtedness resulting in losses alike to property owners, mortgagees, depositors, and others."

No material change was shown by the appellant in the circumstances which led to this finding in February, 1942, either up to the date of the enactment, on March 11, 1943, of the statute under attack, or up to the dates of trial of the action on May 22 and 23 of 1944.

Indeed, Governor Dewey, in his 1943 message to the Legislature, took cognizance of this finding in the James Committee report when, after referring to the origin of the moratorium legislation and stating that debts should be paid off in a period of high economic activity, he added (1943 Legislative Document No. 1, p. 9):

"But we must recognize the existence of a new emergency. Wage ceilings, rent ceilings and taxes make it impossible for many property owners to liquidate their debts. Accordingly, I recommend continuance of the mortgage moratorium for another year."

That the Governor's recommendation, as well as that of the Janes Committee, was adopted by the Legislature is evidenced by the enactment of chapter 93 of the Laws of 1943, the act presently challenged. While the Legislature at that time declared that the emergency of 1933 had continued, the conditions creating the 1933 emergency as set forth in the enactment that year were not repeated in the 1943 statute. The Legislature, in declaring the continuance of an emergency, undoubtedly had in mind the new facts related in the Janes Committee report and this was the view of a majority of the Court of Appeals in the opinion upholding the Moratorium law (R. 171-172; also 293 N. Y. at p. 628).

c. The 1944 and 1945 Extensions of the Moratorium Law.

The Moratorium Law was extended in 1944 (L. 1944, c. 562) for an additional year, Governor Dewey at that time expressing his belief "that while the mortgage moratorium should be continued so as to avoid undue sudden hardship, the bill should provide for reasonable payments upon the principal of these debts and require the owners to maintain the premises in good condition" (1944 Legislative Document No. 1, p. 16). The 1944 statute, as already indicated, increased the rate of amortization to 2%.

In 1945 the Legislature again found the need for continuing the Moratorium Law for an additional year (L. 1945, c. 378). The rate of amortization was then increased to 3%. Section 1 of the 1945 statute declares that the emergency existing at the time of the enactment of the applicable chapters of the 1933 statute having continued and still existing,

"because of the large amount of real estate which would be subject to immediate foreclosure if such sections and chapters were not continued in force and effect, and such emergency having been aggravated by the

substantial amount of foreclosed real estate still held by insurance, banking and other financial institutions, by the imposition of ceilings on rents and wages at a time when there has been a disproportionate rise in maintenance and repair costs, and by the fact that over one million of the residents of this state are serving in the armed services of the nation, the provisions of such chapters * * * shall, * * * remain and be in full force and effect until July first, nineteen hundred forty-six, * * *

The 1945 law was enacted upon the recommendation of the Joint Legislative Committee on Mortgage and Real Estate. The Committee's recommendation was made after it had held a public hearing at which much evidence of a continued emergency was presented to it (1945 Legislative Document No. 55). Organizations representing thousands of home owners pleaded for the continuation of the Moratorium Law (Minutes of Joint Legislative Committee on Mortgage and Real Estate, February 13, 1945, S. M. pp. 2, 4, 7, 24, 46, 50, 52, 59, 64, 67, 70, 90, 92, 142 and 149). They based their pleas on the increased cost of living and burdensome taxation (*id.* pp. 5, 9); on the plight of the people on fixed salaries, annuities, and older people who did not benefit financially from the economic activity due to the war effort (*id.* pp. 13, 47, 63, 88, 142); and on the difficulties of families having men in the service (*id.* pp. 5, 9, 47, 51, 54, 95-96).

The impossibility of obtaining loans on real property in certain sections of the City and on older buildings was also urged (*id.* pp. 10-11, 54 and 66); that certain areas were excluded by banks from refinancing was admitted by Mr. Paul Albright, representing the Savings Banks Association of The State of New York (*id.* p. 124). The fact that not every good mortgage could be refinanced was suggested also on the trial of this case, when the statement of plaintiff's witness that there was a favorable market for refinancing residential mortgages was

made subject to the condition that, "the occupancy, location, and physical condition is such that a loan can be procured on it at all" (R. 69). (Italics ours). In other words, in spite of the claim that mortgage money was readily available, there were certain areas which could not be refinanced and where the owners, no matter how cooperative, would be unable to salvage their equities.

It was also testified that maintenance and repair costs were steadily mounting (*id.* pp. 55, 56, 63, 64 and 144) and that O. P. A. rental ceilings added to the home owner's difficulties (*id.* pp. 145, 150).

5. Additional Facts Supporting the Legislative Finding that an Emergency Existed in 1943.

a. Increased Wages Offset by Rising Living Costs and Heavy Tax Burden.

The testimony submitted by the appellant as to the increase in the average weekly wage (R. 43) must be considered in the light of the increased cost of living and the heavy tax burden. Appellant's own witnesses testified that the cost of living had risen about 25% over 1935 (R. 45-46). While this conceded increase is in itself substantial, we do not accept that figure as actually representing the percentage of rise in living costs. From the figures released by the War Labor Board on November 18, 1944, it appears that the overall increase in the cost of living from December 7, 1941 alone had been at least 29 to 30% (New York Times, November 19, 1944, sec. 1, p. 1, col. 1).

Moreover, it is a fact of common knowledge that the greatest wage benefits have been obtained by those engaged in manufacturing industries, particularly war industries, and that persons employed on fixed salaries have received little direct benefit from the increased employment and rising wage scale.*

* See also WALLACE, *Sixty Million Jobs* (1945), p. 48.

The plight of employees on fixed salaries may be gleaned from the fact that the State Legislature found it necessary to grant State employees a cost of living bonus ranging from 10 to 20% of the basic salary (see L. 1943, c. 187; L. 1944, c. 114; L. 1945, c. 159). Similar bonuses were granted by the City of New York to its employees (see Terms and Conditions of the Budget of the City of New York for 1944-1945, page "e", par. 4). Obviously, the predicament of persons dependent on pensions and annuities, and those white-collar workers who have not been fortunate enough to be granted cost of living bonuses, is even greater. In this connection it should also be borne in mind that the Little Steel Formula, formulated in 1942, placed a limit on increase in wages of a maximum of 15% above the January 1, 1941 level. *In re Bethlehem Steel Corp. et al.*, 1 War Lab. Rep. 325 (1942).

It is also noteworthy that the Emergency Price Control Act² (50 U.S.C., App. § 901 *et seq.*) has as one of its declared purposes the protection of "persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; * * * which would result from abnormal increases in prices; * * *." This is a plain indication of the Congressional awareness of the financial difficulties of this large segment of our population.

The plight of the low-income group, particularly the white-collar class, is described in a speech of Representative Engel of Michigan before the House of Representatives (91 Cong. Rec. [March 19, 1945] 2476-2477), where he called attention to the recent trend of income tax policy to reduce exemptions and increase the taxes even on low-income groups. Quoting from a statement of the Treasury Department issued in 1944, Representative Engel pointed out that of approximately 67,000,000 receiving incomes against which a personal tax liability is imposed,

21,600,000 received incomes of \$1,000 or less, 24,400,000 received incomes ranging from \$1,000 to \$2,000 and 12,200,000 received \$2,000 to \$3,000 per year (*ibid*).

On the subject of increased living costs the following estimates were cited (*id.* pp. 2476-2477):

(a) The Bureau of Labor Statistics report of January 30, 1945, showing that the cost of living on December 15, 1944, had risen 27% above the 1935-1939 level.

(b) The report of the research and information service of the American Federation of Labor showing an increase of 46.4% in living costs from 1939 to December 1944.

(c) The estimate of the Congress of Industrial Organizations that living costs had increased 45.3% between January 1941 and March 1944.

The Legislature had some basis on which to conclude, therefore, that by reason of the increase in cost of living and the heavy tax burden, the plight of the fixed salary group was so serious in 1943 as to require statutory protection.

Nor should the vital fact be overlooked that the percentage of increase in employment was due in a very large measure to the defense program. Many of these employments may be accurately described as temporary in nature, terminating with the cessation of hostilities. In his 1945 message to the State Legislature, Governor Dewey observed that "cut-backs in war production have already created job problems for thousands" (1945 Legislative Document No. 1, p. 8). At the same time the Governor also stated (*ibid.*):

"After final victory in the war has been won, no problem confronting the people of our State will be more urgent than full production and full employment. More than 1,200,000 of our young men and women are serving their country in uniform and 2,000,000 of our

men and women are engaged in war production. Peacetime employment will constitute a challenge to business and to the government of the State."

The problems envisaged by the Governor are now surely coming to pass. Wholesale shut-down of factories and lay-offs came quickly on the heels of the Japanese surrender. On the day following the capitulation of Japan, John W. Snyder, Director of War Mobilization, stated that the unemployment total is currently at 1,100,000 and that the total is "expected to rise to 5,000,000 or more within three months; perhaps to 8,000,000 before next spring as those released from war jobs are joined by large numbers of men discharged from the armed services." (Report dated August 15, 1945, from John W. Snyder, Director of War Mobilization and Reconversion, to the President, entitled "From War to Peace: A Challenge," as reported in the New York Times, August 16, 1945, p. 12). That this prophesy had considerable validity appears from the fact that within ten days after the surrender of Japan the War Man Power Commission estimated that 2,000,000 men were displaced from their jobs. New York was among the areas hit hardest by the displacements (New York Times, August 30, 1945, p. 13, col. 3). All this plainly shows the temporary character of the economic improvement upon which appellant relies to overthrow the moratorium legislation. We cannot, of course, prophesy the speed with, or the extent to which the reconversion program will absorb the great numbers whose jobs have terminated or will terminate as a result of the cessation of hostilities.

Appellant points to the manpower controls established in 1942 as indicative of the complete reversal of employment opportunities between 1933 and 1943 (App. Br. p. 23). Here, again, appellant overlooks the fact that these controls became necessary for the maximum utilization of manpower in the advancement of the war effort,

and it is noteworthy that the day after the termination of hostilities with Japan was announced all manpower controls were abolished (See Report of John W. Snyder, Director of War Mobilization, New York Times, August 16, 1945, p. 12, col. 3).

b. The Depressed Condition of Real Estate in New York State.

A consideration of the following facts gives clear indication of the difficult real estate situation in New York. Thus it appears that in 1938 the total consideration from real estate sales in the Borough of Manhattan was 79.5% of the assessed valuation, whereas in 1943 the total consideration dropped to 63.7%.* Although the figures compiled by the Real Estate Board of New York show a gradual increase in the number and dollar value of sales from 1938 to 1943, it also appears that there was a gradual decline in the percentage of consideration received as compared with assessed values. And under the New York Constitution (Art. XVI, § 2) and Tax Law § 8, assessments must equal but may not exceed the full value of the property assessed. The decrease in the percentage of sales price to assessed valuations occurred in

*The following table shows the total number of sales, the consideration received and the proportion of the consideration to the assessed valuations in the sale of real estate in the Borough of Manhattan for the years 1938 to 1943 inclusive. The figures were compiled from reports made to the Real Estate Board of New York by the Real Estate Record and Builders' Guide and reprinted in Members' News Bulletin of February, 1945:

<i>Year</i>	<i>No. of Sales</i>	<i>Total Considerations</i>	<i>Proportion Total Considerations to Total Assessed Valuations</i>
1938	2311	\$ 98,823,376	79.5%
1939	2693	120,831,337	75.5%
1940	2591	128,645,737	72.6%
1941	2748	149,623,644	65.8%
1942	2417	136,403,378	63.8%
1943	3651	244,994,901	63.7%

spite of the reduction in real property assessments in New York City,* giving strong indication that the increased sales were liquidation disposals in a depressed real estate market.

That the increase in real estate activity was more relative than absolute is further indicated by the testimony of plaintiff's witness Bussing, which showed an increase in 1943 of only 36% over 1933, in the total number of conveyances (R. 48).

In the Borough of Manhattan alone there were 586 foreclosures during 1943, representing total liens of \$68,423,739. In addition there were forced surrender sales of 773 parcels representing total liens of \$34,807,166. In both instances the quoted amounts were greater than those for the year 1942.** These figures certainly are not

*The following figures showing the total assessed valuations of all ordinary real estate in New York City from which taxes are collectible are taken from the official figures published by the Tax Department of the City of New York:

Year	Total Assessed Valuation of Ordinary Real Estate	Decrease in Preceding Years Total Assessed Valuations
1939-40	\$14,558,596,052	\$ 62,222,294
1940-41	14,417,161,363	141,434,689
1941-42	14,224,025,514	193,135,849
1942-43	14,093,587,819	130,440,195
1943-44	13,927,482,855	166,103,964
1944-45	13,767,145,530	160,349,825

**The following table shows the number of foreclosures and the number of forced surrenders for the years 1941 to 1944 inclusive in the Borough of Manhattan. The figures were taken from the Members' News Bulletin of February, 1945, a monthly publication issued by the Real Estate Board of New York, Inc.:

Foreclosures			Surrenders	
Year	No.	Total Liens	No.	Total Liens
1941	515	\$88,755,627	450	\$31,137,456
1942	540	52,197,416	655	32,537,709
1943	586	68,423,739	773	34,807,166
1944	437	51,761,255	561	25,944,589

indicative of conditions calling for a discontinuance of moratorium legislation.

Another indication of the difficult real estate situation in New York is apparent from the fact that liquidation by the Home Owners Loan Corporation was considerably slower in New York than elsewhere and that more than one-sixth of its foreclosures involve New York properties (App. Br. pp. 67, 68).

Nor is the fact to be overlooked that New York City has been designated as a "defense-rental area" subject to the maximum rental regulations under the Emergency Price Control Act. (Document No. 22704 issued October 8, 1943, by the Office of Price Administration.) And in spite of the substantial increase in cost of almost every commodity and service, it appears from the reports of the United States Bureau of Labor Statistics that rents in New York City have gone up only about 3% since 1935.*

* The following table, compiled from figures furnished by the United States Bureau of Labor Statistics, appears in the March, 1944 issue of The Industrial Bulletin, published by the New York State Department of Labor, and shows the increase in cost of various items in the United States, New York City and Buffalo between 1935 and 1944:

Item	Indexes (Average 1935-39=100)			Percentage change from February 15, 1943 to February 15, 1944		
	United States	New York City	Buffalo	United States	New York City	Buffalo
All items	123.7	124.0	125.0	+2.2	+3.2	
Food	134.5	135.4	134.0	+0.7	+1.5	-3.0
Clothing	134.8	138.6	133.3	+6.8	+9.5	+5.5
Rent	108.1	103.5	114.6	+0.1	+0.3	
Fuel, elec- tricity and ice	110.3	115.2	108.4	+2.9	+4.2	+3.2
House fur- nishings	128.2	123.7	127.2	+3.3	+4.9	+1.6
Miscellaneous	118.6	119.6	122.7	+4.4	+5.7	+1.3

The Real Estate Board of New York indicated its awareness of the difficulties of the residential property owner when, in a statement issued in response to Mayor LaGuardia's proposal to increase assessed valuations in New York City, it stated (New York Times, Jan. 5, 1945, p. 28, col. 1):

"Certainly the Mayor is not talking about residential property when he stated that real estate never was more prosperous than it is today."

In the same statement the Board pointed out that market prices for real estate, as shown by open market deals, averaged about 82.9 per cent of the assessed valuations in 1937, 72.6 per cent in 1940 and 63.7 per cent in 1943. The realty group also cited the low percentage of prices to assessed values in the liquidation of bank and insurance company holdings as further arguments against increased assessed valuations (*ibid.*):

c. The "Overhang" of Foreclosed Real Estate.

From the exhibits submitted by the appellant it appears that savings banks in Group V, those located in the Long Island area, including Brooklyn, Queens and Nassau, were the involuntary holders on January 1, 1944, of approximately \$21,500,000 of real estate reduced to possession through foreclosures of deeds (Pl. Ex. 5, printed at R. 140, offered at R. 85; Pl. Ex. 6, printed at R. 141, offered at R. 86).

The amount of repossessed real estate held by all lending institutions throughout the State is undoubtedly much greater. The report of the State Superintendent of Banks shows that on October 30, 1943 the net book value of real estate held by banks, trust companies, savings banks and savings and loan associations throughout the State aggreg-

gated \$183,713,000 (Report of State Superintendent of Banks for 1943).*

The real estate holdings of life insurance companies are even more substantial. As of December 31, 1943, their holdings, exclusive of home office properties, totalled \$306,913,342 in appraised market value.** Under the New York Insurance Law § 81 (7), similar to the provisions of the New York Banking Law § 98 (3), insurance companies are prohibited from holding such real estate for a greater period than five years from the date of acquisition by foreclosure or otherwise, unless the time is extended by the Superintendent of Insurance.

There are also the holdings of the Liquidation Bureau of the New York State Department of Insurance. The Superintendent of Insurance reports that as of December 31, 1943, this Bureau had on hand undisposed of real estate with offering prices totalling approximately \$12,370,000.00, and unliquidated mortgages totalling \$19,325,781.83 (1944 Legislative Document No. 69, pp. 24a-26a).

The foregoing figures show that there was over \$500,000,000 worth of real estate held by banks, life insurance companies and the liquidator of defunct mortgage guaranty companies still remaining to be liquidated at approximately

* The following table of real estate held by lending institutions has been compiled from the annual report of the Superintendent of Banks for the year ending December 31, 1943 (1944 Legislative Document No. 21, pp. 14, 29, 34):

<i>Type of Institutions</i>	<i>Net Book Value (10-30-43)</i>	<i>Net Book Value (10-31-42)</i>
1. Banks and Trust Companies ...	\$ 27,000,000	\$ 40,000,000
2. Savings Banks	151,020,000	204,885,000
3. Savings and Loan Associations	5,693,016	9,030,000
	<hr/> \$183,713,016	<hr/> \$253,915,000

** This figure is compiled from the annual financial reports of life insurance companies on file in the office of the New York State Department of Insurance.

the time of the trial. In addition there are the unliquidated holdings of the Home Owners Loan Corporation, of individual trustees and of private and corporate owners to be considered. As the trial justice pointed out (R. 164), not until the substantial holdings of those unwilling owners are reduced so as to eliminate them as a competitive factor with the real estate of willing sellers, can there be said to exist a normal market.

For at least four years (1934-1937; figures for 1932 and 1933 were not given) mortgage foreclosures had exceeded new loans (R. 98-99, 141, 164). We have seen also that foreclosures continued at a substantial rate long after 1937. Thus it should not be surprising that substantial amounts of foreclosed real estate remained in the hands of lending institutions as late as 1943.

Another factor closely akin to that of the "overhang" of foreclosed real estate is that of the substantial amount of mortgages still protected by the moratorium and not subject to voluntary amortization agreements. Appellant argues that the Legislature should have relied on the good judgment of lending institutions as sufficient assurance that a complete lifting of the moratorium would not result in a flood of new foreclosure actions and load banks and insurance companies with more real estate. Surely the Legislature cannot be criticized, however, for providing appropriate statutory protection against such a result.

Plaintiff's own testimony at the trial showed that approximately one-third of the mortgages held by Brooklyn and Queens savings banks which were executed before 1935, were not being amortized in 1942 (R. 89-90; Pl. Ex. 11, printed at R. 147, offered at R. 88). This meant that over \$168,000,000 principal amount of mortgages would become subject to immediate foreclosure in Brooklyn and Queens alone, if there had been an abrupt termination of the mortgage moratorium (see R. 147). Applying the same proportion to the total of approximately four billion

dollars of moratorium-protected mortgages outstanding in 1942 (*ante*, p. 10), we have a total of over one billion dollars which might have been added to the already large total of foreclosed real estate, if the Legislature had followed the course which plaintiff now argues was its only proper course.

Opinions Below

1. *Opinion of the Trial Court (R. 162-165).*

After a brief reference to the nature of the action and the statute involved, the trial judge noted that in spite of the testimony to the effect that the real estate market was active in 1943 and that much foreclosed real estate had been liquidated; the testimony of appellant's own witnesses showed that a substantial amount of "overhang" real estate was still held by savings institutions. In this connection the Court wrote (R. 164; also 182 Misc. at p. 865):

"There is still to be liquidated, and was at the time of the commencement of this action, a considerable amount of real estate held by savings banks, insurance companies, Home Owners' Loan Corporation and the trustees of estates. Not until the holdings of these unwilling owners of real estate have been reduced, so that they are no longer a factor in competition with the real estate of those who willingly acquired real estate and are willing but not forced to sell, can it be said that there is a normal real estate market."

✓ In view of these circumstances, the trial judge said, the Legislature had the right to determine that there was an abnormal deflation of real property values at the time of the enactment of the 1943 statute. In his opinion an emergency still existed at the time this foreclosure action was instituted and he accordingly granted defendants' motion to dismiss the complaint.

2. *Opinions of the Court of Appeals (R. 169-177).*

a. *The Majority Opinion (R. 169-172).*

Chief Judge LEHMAN, writing for the majority of the Court (one Judge dissenting), pointed out at the outset that the remedy provided by the original Moratorium Law enacted in 1933 (L. 1933, c. 793) was justified by the extraordinary conditions as set forth in the legislative declaration "and as confirmed by common knowledge." Responsibility for determining when extraordinary conditions exist which threaten the welfare, comfort and safety of the people, he stated, is the Legislature's. And though the legislative choice of a remedy is not conclusive, its findings are entitled to great weight "and the legislative remedy will not be stricken down unless its invalidity is clearly established."

Addressing himself then to the 1943 extension of the Mortgage Moratorium Law, he stated that doubtless many of the adverse conditions resulting in the economic emergency of 1933 had disappeared before 1943; but, he stated (R. 171; also 293 N. Y. at p. 628):

"The Legislature did not, in 1943, find that these conditions still existed. It found only that the 'serious public emergency' existing in 1933 and 'resulting' from these conditions, still existed."

After pointing out that it was a matter of common knowledge that in 1943 payrolls and savings banks deposits had increased, he continued (R. 172; also 293 N. Y. at p. 628):

"On the other hand, an accumulation of past due mortgages resulting from the ten-year-old ban upon actions to foreclose mortgages for default in the payment of principal might reasonably cause apprehension that a flood of foreclosure actions would follow removal of the ban and might itself justify a statute reasonably calculated to stem the impending flood. Reports which legislative committees made to the Legis-

lature in 1938 and 1943 as well as a message of the Governor called to the attention of the Legislature also the fact that abnormal conditions incident to a war economy or resulting from other causes might still constitute a threat 'to the welfare, comfort and safety of the people of the state' and might call for the exercise of the legislative power to provide an extraordinary remedy for extraordinary conditions."

Judge LEHMAN then called attention to the recognized presumption that the Legislature "inquired and found" that there was need for the continuance of the suspension of the right of mortgage holders to foreclose for principal defaults. And after stating that it was entirely immaterial "whether the conditions then existing have created a new emergency," or "resulted in the continuance of an emergency itself created by conditions which have run their course," he added (R. 172; also 293 N. Y. at pp. 628-629):

"The question which the court must decide is whether the Legislature in the challenged statute has provided an appropriate remedy to tide over an exigency resulting from present conditions. We have said in an analogous case that: 'Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the exercise of the reserved power of the state and whether the remedy adopted by the state is reasonable and legitimate'."

He concluded that the challenged statute met that constitutional test.

b. The Dissenting Opinion (R. 172-177).

Judge LEWIS was the only judge dissenting. After briefly reviewing the testimony as to the improvement in economic conditions over 1933, such as increased employment, wages, bank deposits and the amount of money in circulation, and as to the activity in the real estate market, he reached the conclusion (R. 177; also 293 N. Y.

at p. 633):

"that the emergency which caused the enactment of the Moratorium Law of 1933 was not 'still existing' on March 11, 1943, when chapter 93 of the Laws of 1943 became a law."

His dissent fails to take into consideration the abnormal factors incident to a war economy and completely disregards the dangers that would flow from the sudden removal of the ban on foreclosure of mortgages which had been accumulating as a result of a ten-year-old restriction and which, as the opinion of the majority noted (p. 628), "might itself justify a statute reasonably calculated to stem the impending flood."

Argument.

Upon the facts outlined above, we shall argue as follows:

1. The validity of moratorium laws as a proper exercise of the state police power can no longer be questioned.
2. Appellant's evidence fails to show that the challenged moratorium statute was without rational basis and the presumption of validity must, therefore, prevail.

POINT. I

The validity of moratorium laws as a proper exercise of the State Police power can no longer be questioned.

1. *The Blaisdell decision alone justifies sustaining the New York Moratorium Law.*

We have seen that the challenged statute was based upon a legislative declaration of the existence of an emergency (L. 1943, c. 93, § 1). There is a strong presump-

tion that the Legislature "inquired and found" the necessity for the particular legislation (*Szold v. Outlet Embroidery Supply Co.*, 274 N. Y. 271, 278, 8 N. E. (2d) 858, 860 [1937]), that it "understands and correctly appreciates the needs of its own people," and that "its laws are directed to problems made manifest by experience." *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 157 (1919); *Townsend v. Yeomans*, 301 U. S. 441, 451 (1937).

In the case at bar, we need not rely solely on presumptions, for the 1943 Legislature had before it the exhaustive report of the Joint Legislative Committee of 1942. This report, which we have previously analyzed, informed the Legislature of conditions in the mortgage field and of economic factors which bore strongly on the moratorium problem. It was there emphasized that because of the rising cost of living and the heavy burden of taxation, the plight of a substantial part of the population was not much better than it had been in 1933. The report pointed to the rent-freezing statutes, the high maintenance and repair costs, the depressed condition of the real estate market, and to the large amount of "overhang" real estate being held by lending and other institutions. In the event of the then sudden termination of the moratorium, it was declared, these factors "might result in a very large amount of forced liquidation of mortgage indebtedness resulting in losses alike to property owners, mortgagees, depositors, and others" (1942 Leg. Doc. No. 45, p. 5). The Committee accordingly found that the emergency in the mortgage field still exists and "that the sudden termination of the moratorium would of itself now create an emergency" (*ibid.*).

So far as material, the statute which the Legislature enacted to cope with the declared emergency, continued the ban on actions for the foreclosure of mortgages executed prior to 1932 where the only default was in the pay-

ment of principal. As long as interest, taxes, assessments and the amortization provided for by the act were paid, the mortgaged property could not be foreclosed. Provision was also made for reaching surplus income and applying it to past due principal.

In spirit and in purpose, the New York statute is similar to the Minnesota mortgage moratorium law which this Court sustained in *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398 (1934). Indeed, the New York statute gives greater protection to the mortgagee than the Minnesota statute did.

The Minnesota law authorized the Court to extend the one-year period of redemption from foreclosure for such time as was deemed equitable, but not beyond a prescribed date. During that period, the mortgagor was to apply the income or rental value of the property to the payment of taxes, insurance, interest and the mortgage indebtedness. Under the New York law, taxes, interest and the amortization required must be paid in full, whereas under the Minnesota statute the only requirement was that the income or reasonable rental value be applied toward the specified charges; and even though that sum was insufficient to meet such carrying charges, the period of redemption could still be extended. In fact, in the *Blaisdell* case, it appeared that during the period of redemption, a \$200 deficit had been run up. 290 U. S. at p. 420. There, as here, it was urged that the statute was repugnant to the contract and due process clauses of the Federal constitution, but this Court overruled these contentions and wrote (290 U. S. at pp. 434-435):

"Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.'"

After citing numerous cases (pp. 434-438) where it was held that contracts had to give way to the requirements of public health, safety, morals and general welfare, the Court, in the course of its opinion, emphasized that the "economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts" (p. 437).

Answering the argument that the Minnesota law affected contracts directly, whereas in the cases which the Court cited the obligation of the contracts was only incidentally affected, the Court laid down this controlling test (p. 438):

"The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."

The New York 1943 Moratorium Law squarely meets the test of the *Blaisdell* decision. It is addressed to a legitimate end, having as its purpose the protection of the owner and the investor from the chaotic conditions that would inevitably follow from the sudden removal of the ban on foreclosures. The statute is reasonable in its terms and reasonable in its application. Interest (in the case at bar at 6%), taxes, assessments and the unpaid principal at the rate prescribed by the act must be paid. The principal amount of the mortgage debt is not impaired, and the requirement of amortization which, as we have seen, has been increased to 3% in two successive extensions of the law, is a sound method for tapering off the emergency legislation.

2. The Decision in the *Blaisdell* Case reaffirms the settled rule that all contracts are subservient to the public welfare.

The doctrine of the *Blaisdell* case is but a reaffirmation of the established rule that "the interdiction of statutes

impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected." *Manigault v. Springs*, 199 U. S. 473, 480 (1905); *Stephenson v. Binford*, 287 U. S. 251, 276 (1932); *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 375 (1919); *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U. S. 109 (1937); *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 307-308 (1935); *Twentieth Century Associates v. Waldman*, 294 N. Y. (N. Y. Ct. of App., July 19, 1945 [see Law Rep. News, July 30, 1945, p. 1]).

Thus in the *Stephenson* case, *supra*, for example, it was held that a State, in the exercise of its police power, could change the amount payable under an existing contract for carriage of goods. Conceding that the contracts there involved had been impaired, this Court nevertheless declared (287 U. S. at p. 276):

"Nor does it matter that the legislation has the result of modifying or abrogating contracts already in effect. Such contracts are to be regarded as having been made subject to the future exercise of the constitutional power of the state."

The statute at bar merely operates as a temporary suspension of a remedy. All the mortgagor's obligations continue, including the payment of statutory amortization, and all that is postponed is the right to foreclose for the nonpayment of the principal amount. Surely if the Legislature may in the exercise of its police power actually alter the amount payable under an existing contract, it may temporarily, in the public interest, postpone the mortgagee's right to foreclose for the mere default in the payment of principal.

3. Appellant's Authorities Distinguished.

The cases cited by the appellant (Br. pp. 29, 32) are clearly distinguishable and in no way weaken the force of the principles of the foregoing decisions.

In *Worthen Co. v. Thomas*, 292 U. S. 426 (1934) (App. Br. p. 32), a judgment creditor had garnisheed the proceeds of a life insurance policy payable to the defendant as the wife of her deceased husband. Thereafter, the Legislature enacted a law exempting proceeds of life insurance policies from legal process for the satisfaction of any indebtedness existing at the time of the passage of the act. In invalidating the statute the Court pointed out that the legislation was not limited to the emergency and set up no conditions apposite to emergency relief. The unconditional exemption, it was held, constituted an unreasonable interference with the obligations of contracts. Citing the *Blaisdell* case, Chief Justice HUGHES reiterated the familiar principle that "the relief afforded must have reasonable relation to the legitimate end" (p. 433). As we have shown, the statute at bar meets that basic test, and the *Worthen* case is consequently inapplicable.

In the second *Worthen* case relied on by the appellant—*Worthen Co. v. Kavanaugh*, 295 U. S. 56 (1935) (App. Br. p. 32)—the statute which was upset gave a mortgagor a minimum of six and one-half years during which there was no enforceable obligation to pay either principal, interest or taxes, or even the rental value of the premises. This was criticized as cutting down the security of a mortgage "without moderation or reason" and "in a spirit of oppression" (p. 60). Clearly, no comparable situation exists in the case at bar.

Finally, in *Barnitz v. Beverly*, 163 U. S. 118 (1896) (App. Br. p. 29), it was held (p. 129) that "a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption

previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage." The statute there considered extended the period of redemption unconditionally for a period of eighteen months except when the property had been abandoned or was not occupied in good faith. Although the appointment of a receiver was authorized, the income during the redemption period, except what was necessary for repairs, was still to go to the mortgagor. The differences between that statute and the statute at bar are plainly obvious. Here the limitation on the right to foreclose is hedged about with conditions fully protecting the rights of the mortgagee. As for any broad general principle laid down in that opinion, we submit that it has in effect been overruled by the *Blaisdell* decision.

Moreover, one of the cases principally relied on by the Court in the *Barnitz* case, was *Bronson v. Kinzie*, 1 How. 311 (1843), invalidating a State law, passed subsequent to the execution of a mortgage, which provided that the equitable estate of the mortgagor should not be extinguished for twelve months after sale on foreclosure, and further, preventing a sale unless two-thirds of the appraised value of the property should be bid therefor. In view of the decisions of this Court in the *Blaisdell* case, and in the comparatively recent case of *Gelfert v. National City Bank*, 313 U. S. 221 (1941), the *Bronson* decision is of very doubtful validity. In fact in the *Gelfert* case, the Court, after referring to the *Bronson* and other cases, stated (313 U. S. at p. 235):

"Those cases, however, have been confined to the special circumstances there involved. *Home Building & Loan Assn. v. Blaisdell*, *supra*, pp. 431-434. We cannot permit the broad language which those early decisions employed to force legislatures to be blind to the lessons which another century has taught."

4. Even in the absence of emergency the States have ample power to legislate for the public welfare.

Irrespective of the existence of an emergency, a State has ample power to pass legislation in the public interest for the purpose of protecting the economic welfare of its people. *Veix v. Sixth Ward Ass'n.*, 310 U. S. 32 (1940); and see *Matter of People (Tit. & Mtge. Guar. Co.)*, 264 N.Y. 69, 94, 190 N.E. 153, 161-162 (1934). In the *Veix* case the Court considered a New Jersey statute which radically altered the terms under which withdrawals could be compelled by a member holding shares in a building and loan association. When the plaintiff purchased his shares, the statute permitted him to withdraw upon written notice, and provided that payments were to be made in the order in which requests were made. If payment was not made within six months, the shareholder was permitted to sue for the withdrawal value. Subsequent to plaintiff's purchase, the statute was amended by providing in part that if in any one month available funds were insufficient to pay all requests for withdrawals, withdrawing members were to receive \$500 each in the order of priority; further, if the funds were insufficient to pay all matured shares, no withdrawals were to be paid. So long as the funds of the company were applied as specified in the amended statute, no suit could be brought against the company. In sustaining the constitutionality of this law, the Court reiterated the principle of the *Blaisdell* case that all contracts are made subject to paramount authority of the State to "safeguard the vital interests of its people" (p. 38). This authority, it was emphasized, "is not limited to health, morals and safety" but "extends to economic needs as well" (pp. 38-39). The Court then noted the argument that the cases which established that principle had made repeated reference to an existing emergency at the time of their enactment, whereas in the case then under review it was considering permanent legislation.

Answering the question whether that was a significant factor in the consideration of the contract clause, the Court said (310 U. S. at p. 39):

"We think not. 'Emergency does not create [constitutional] power, emergency may furnish the occasion for the exercise of power.' We think of emergencies as suddenly arising and quickly passing. The emergency of the Depression may have caused the 1932 legislation, but the weakness in the financial system brought to light by that emergency remains. If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue."

In the case at bar, we need not go as far as the *Veir* decision. The question as to the right to bring suit on the bond is not involved in this appeal, and the only point presented is the power to suspend the equitable remedy of foreclosure for a prescribed period. Whether conditions in 1943 would have justified the enactment of permanent legislation to cope with the mortgage problem is of course not before the Court, for the Legislature at that time merely saw fit to re-enact the Moratorium Law for an additional year. But in this connection it is well to bear in mind that emergencies do not always "evaporate" (see *Faitoute Co. v. Asbury Park*, 316 U. S. 502, 512 [1942]), and conditions brought to light in an emergency may warrant remedial legislation of a permanent nature (*Veir v. Sixth Ward Ass'n*, *supra*, 310 U. S. at p. 39). If a State may validly enact permanent legislation with respect to payments by building and loan associations in a manner which unquestionably alters the terms of pre-existing contracts on the theory that these institutions are important to its economy, it certainly has like power to deal with threatened foreclosures in the mortgage field which affect the interests, and in many instances the life's savings of thousands of home owners. This is particularly so when

the interests of the mortgagee are adequately protected and, in addition to getting a fair return on his investment, the principal indebtedness remains unimpaired.

It is also worth emphasizing that building and loan transactions are usually regarded as short term matters with the right of withdrawal on short notice. Mortgages on the other hand are long term investments, lacking the fluidity of the former type of transaction.

The argument (App. Br. p. 15) that a property owner who "has no real equity" to protect should not be perpetuated in his ownership is devoid of merit. For if the owner is willing to pay interest at 6%, taxes, insurance and statutory amortization (now 3%), and to maintain the property in repair in order to preserve his ownership, it hardly lies in the mouth of a lending institution to assert that the owner has no equity to protect, or that the banks should be given unrestricted freedom to decide when it is more profitable to foreclose than to continue receiving interest and amortization.

In summary we again note the facts that the so-called improved economic conditions were due in large part to war activity; that the plight of a major portion of the population had not materially improved; and that the ten-year old ban on foreclosures had brought in its wake new problems which call for appropriate remedies. We consequently find no validity to the claim that the 1943 legislation is an attempt to prefer "a favored group" (App. Br. p. 32). There is no basis for such assertion. The statute is a most reasonable method of tapering off the emergency legislation and, we submit, falls squarely within the rule that legislation which has a reasonable relation to a legitimate end is not repugnant to constitutional prohibitions.

POINT II

Appellant's evidence fails to show that the challenged moratorium statute was without rational basis, and the presumption of validity must therefore prevail.

1. *The Presumption of Constitutionality.*

The principle is deeply rooted that every possible presumption is in favor of the validity of a statute and "though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." *Nebbia v. New York*, 291 U. S. 502, 538 (1934); *United States v. Carolene Products Co.*, 304 U. S. 144, 152 (1938); *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U. S. 532, 543 (1935); *McLean v. Arkansas*, 211 U. S. 539, 547 (1909); *Davis v. Department of Labor*, 317 U. S. 249, 257-258 (1942); *Sinking-Fund Cases*, 99 U. S. 700, 718 (1878). As this Court said in *McLean v. Arkansas*, *supra* (211 U. S. at p. 547):

"The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

A statute consequently will not be overthrown unless its unconstitutionality is established beyond a reasonable doubt (*Sinking-Fund Cases*, *supra*, 99 U. S. 700, 718), and the burden rests upon him who asserts the invalidity of a legislative enactment. *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U. S. 580, 584 (1935); *Erie R. R. Co. v. Williams*, 233 U. S. 685, 699 (1914).

With these basic principles in mind, we briefly examine the testimony adduced by the appellant, against the back-

ground of facts contained in the Janes Committee Report as well as commonly known facts, for the purpose of demonstrating that appellant has wholly failed to establish the invalidity of the statute.

2. Appellant's proof is inadequate to establish the claim of unconstitutionality; at most, it has created a debatable question as to the necessity for the legislation and the legislative choice is therefore conclusive.

Appellant's testimony may be summarized as showing an increase in bank deposits (R. 37-38), money in circulation (R. 40-41), purchases of war bonds (R. 41-42), and in salaries and number of wage earners (R. 42-43). There was also testimony that the real estate market in 1943 was active and that mortgage money was available provided the underlying security was good and the location of the property satisfactory (R. 103-104, 108).

The foregoing testimony must be considered in the light of the findings set forth in the Janes Committee Report (1942 Leg. Doc. No. 45), and in the light of the facts of common knowledge. Thus, appellant's proof must be weighed against the fact that there has been a tremendous rise in the cost of living; that less than one-tenth of the State's population and less than one-sixth of its wage earners had benefited directly by the improvement in employment and in factory wages; that the plight of people with fixed incomes is almost as great as it was in 1933; that the cost of maintenance and repairs has mounted considerably; that in many instances the economic condition of the family had become more difficult because the breadwinner was in the service of his Country; and that the large amount of "overhang" real estate held by banks and other institutions constitutes a continuing threat to the real estate market.

It should also be noted that appellant's own witness testified that a good part of the improvement in the real

estate market was due to new construction and to the guarantee of loans on new residences by the Federal Housing Administration (R. 109, 111). These factors, as we have ~~pointed~~ out, played no part at all in aiding moratorium protected properties, all of which had been constructed prior to 1932.

We have also seen that in the years 1941-1944 foreclosures and forced surrenders still continued in large numbers (see footnote *ante*, p. 21), and that in 1943 the ratio of consideration received on property sold in the Borough of Manhattan as compared with assessed valuations, was only 63.7%, despite the decrease in tax assessments in New York City (see footnotes *ante*, pp. 20 and 21).

As previously noted, the Real Estate Board of New York, in opposing Mayor LaGuardia's proposal for increased assessed valuation, stated that the "Mayor is not talking about residential property when he stated that real estate never was more prosperous than it is today" (New York Times, January 5, 1945, p. 28, col. 1).

Further indication of the difficult real estate problem in New York appears from the fact that more than one-sixth of the foreclosures by the Home Owners Loan Corporation involved New York properties, and liquidation of properties in New York was considerably slower than elsewhere. Whereas foreclosures in the nation involved less than twenty per cent of the 1,017,821 original loans,* in New York State the figure was forty-two per cent. These foreclosures and subsequent resales in New York resulted in losses running into millions of dollars, (see App. Br. pp. 67-68).

It was on the basis of these and other facts which we have previously set forth that the Janes Committee

*The word "loans" is undoubtedly intended, although printed as "losses" in appellant's brief, page 68. (See New York Times, March 18, 1945, sec. 1, p. 34, col. 3.)

concluded that any sudden removal of the restriction on foreclosures would demoralize the mortgage market and result in substantial losses not only to the owners but to mortgagees as well.

We submit that recitals in the original enactment of the 1933 mortgage moratorium of abnormal obstructions in economic and financial processes are in a substantial sense still valid. The war-stimulated activity was not a natural or ordinary process of economic life. As late as 1940, according to the estimate of the American Federation of Labor, there were still 9,104,000 unemployed.* The temporary absorption of a large number of these unemployed upon our entry into the war was of course not a permanent solution of the difficult problem of unemployment. The so-called improvement in economic conditions was due, in the major part, to the war effort, and the termination of hostilities has already brought in its wake a host of difficult and challenging problems. The Director of War Mobilization and Reconversion in his Report to the President of August 15, 1945, estimated that the total number of unemployed was expected to rise to 5,000,000 or more within three months, and to 8,000,000 before next spring (Report of John W. Snyder, Director of War Mobilization and Reconversion, as reported in the New York Times, August 16, 1945, p. 12).

Also of significance in considering the 1943 statute (the only one directly involved in this case), is the fact that the Legislature found it necessary to re-enact the moratorium legislation in 1944 and 1945. The 1945 re-enact-

* The estimate of 9,104,000 is taken from a table compiled by the American Federation of Labor appearing at page 25 of the August, 1941, issue of the American Federationist, the official magazine of the American Federation of Labor. This figure is also confirmed in an article appearing in the April, 1943, issue of the Survey of Current Business (pp. 10, 16), published by the Department of Commerce, wherein it is estimated that the number of unemployed in 1940 was 8,900,000.

ment was made after a joint legislative committee on mortgage and real estate had held a public hearing and had rendered a report in which it stated that it found "much evidence of a continued emergency." Certainly, conditions in 1945 are not much different from those in 1943, and the very need for the continuance of the legislation up to this time emphasizes the necessity for the 1943 enactment.

In the light of the foregoing facts it may not be said that the legislative effort to cope with the mortgage problem was without rational basis. On the contrary, we submit that the Act is an appropriate means of dealing with a danger which the legislature on adequate grounds had reason to apprehend. The protection of thousands of home owners, which is the primary purpose of the moratorium law, from catastrophic results that might follow from unrestricted foreclosures, is clearly within the legitimate sphere of the State's police power. The existence of reasonable grounds for belief that these evils might occur is sufficient to sustain the legislative action even though there be an "earnest conflict of serious opinion" on the subject. *Erie R. R. Co. v. Williams*, 233 U. S. 685, 699 (1914).

"Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature." *Tanner v. Little*, 240 U. S. 369, 385 (1916). For the courts are not concerned with the wisdom or the propriety of the legislative action, but only with the question whether it lacks any reasonable basis to support it. *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U. S. 177, 191-192 (1938); *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 510 (1937); *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 311 (1935); *Nebbia v. New York*, 291 U. S. 502, 537 (1934). As this Court said in *South Carolina State*

Highway Department v. Barnwell Bros., *supra* (303 U. S. at pp. 191-192):

"Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved *preclude* that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." (*Italics ours.*)

So, too, in *Carmichael v. Southern Coal Co.*, *supra*, the Court, in discussing the limitation on the judicial function in passing upon the constitutionality of statutes, wrote (301 U. S. at p. 510):

"A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record, courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action."

The Court added (*ibid.*):

"Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

In the case at bar, the facts in the Janes Committee Report, as well as facts of common knowledge, afford ample support for the legislative action.

The existence of honest differences of opinion or debatable questions as to the wisdom or propriety of the statute furnishes no ground for striking down a legislative enact-

ment, and the legislative choice, under such circumstances, is binding on the courts.* *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 196 (1936); *Standard Oil Co. v. Marysville*, 279 U. S. 582, 586 (1929); *Sproles v. Binford*, 286 U. S. 374 (1932); *Hebe Co. v. Shaw*, 248 U. S. 297, 303 (1919); *Zahn v. Board of Public Works*, 274 U. S. 325, 328 (1927).

The applicable rule, where the legislative determination is based upon questions which are fairly debatable, was succinctly set forth in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, *supra*, where the Court wrote (299 U. S. at p. 196):

“Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature.”

With equal clarity and pungency Mr. Justice STONE in *Standard Oil Co. v. Marysville*, *supra*, declared (279 U. S. at p. 584):

“We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision.”

* The existence of an honest dispute as to just what the real estate situation is in New York is illustrated by the recent decision of the Emergency Court of Appeals in *315 West 97th Street Realty Co., Inc., et al. v. Bowles*, Vol. 5, C. C. H. (Price Control Cases), pages 54,701 *et seq.* Although the Emergency Court found that the operating income of owners of apartments in the sub-standard group has been reduced by more than 25% since 1939, it nevertheless upheld the rental ceilings on all property, except as to the so-called luxury apartments. With respect to the luxury apartments, it directed an increase over the base rate, but upon application by the Price Administrator the judgment was subsequently vacated and permission was granted to the Administrator to introduce additional evidence.

The holding in *Chastleton Corp. v. Sinclair*, 264 U. S. 543 (1924), is not in conflict with the foregoing principles. There it was merely held that plaintiff's allegations that an emergency no longer existed could not be declared "offhand to be unmaintainable" (p. 548). But that decision does not justify the substitution by a court of its judgment for that of the legislature, particularly where the legislative finding is the result of an investigation and is based on reasonable grounds. The principle has received repeated recognition by this court, as is abundantly illustrated by the cases we have cited.

Moreover, in the case at bar, the highest court in the State has sustained the legislative finding. That interpretation is entitled to respect and is to be accepted unless "clearly without ground." See *Union Lime Company v. Chicago & N. W. Ry. Co.*, 233 U. S. 211, 218 (1914); *Jones v. City of Portland*, 245 U. S. 217, 221 (1917); *Hairston v. Danville & Western Ry.*, 208 U. S. 598, 607 (1908). For where State courts have determined the factual question as to the existence of an emergency, that determination should not lightly be overturned. Cf. *Bodkin v. Edwards*, 255 U. S. 221, 223 (1921); *Thomas v. Kansas City Southern Ry. Co.*, 261 U. S. 481, 484 (1923); *Page v. Rogers*, 211 U. S. 575, 577 (1909); *Akins v. Texas*, 324 U. S. . . . , 65 Sup. Ct. 1276, 1278 (1945).

In the recent case of *Akins v. Texas*, *supra*, 65 Sup. Ct. at p. 1278, this Court stated that, even though it has a duty of making independent review of the facts where questions under the Fourteenth Amendment are involved, it gives great respect to the conclusions of the State courts and will accept a finding on disputed issues "unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process," citing *Lisenba v. California*, 314 U. S. 219, 238 (1941).

The factual conclusions of a State court on a due process question relating to property rights should be entitled to at least as much weight as similar conclusions in a criminal case.

3. It is of no significance whether the emergency is the result of new or old conditions.

It is argued that the statute under attack can only be sustained on the ground that the 1933 emergency has continued and not on the basis of any new emergency that may have arisen (App. Br. pp. 33-36). There is no validity to this contention.

Many of the factors which justified the 1933 legislation (see *ante*, pp. 7-8) were prevalent in 1943, and are still valid today. Moreover we think it quite unimportant, as Judge LEHMAN pointed out, whether the conditions in 1943 "have created a new emergency" or have "resulted in the continuance of an emergency itself created by conditions which have run their course" (293 N. Y. at p. 628). The question rather, is whether the challenged legislation provides "an appropriate remedy to tide over an exigency resulting from present conditions" (*ibid.*).

An argument somewhat similar to that here advanced by the appellant was made in *Biddles v. Enright*, 239 N. Y. 354, 146 N. E. 625 (1925), where it was urged that reasons assigned for the original passage of an act must be adhered to and that no other reasons or conditions, however good or sufficient to make it constitutional, may be considered. Answering that contention, the New York Court of Appeals aptly said (239 N. Y. at p. 361):

"New conditions may sustain the same reason, or, to be more accurate, reasoning from new conditions and new premises may bring us to the same result."

Whether the legislation was required because of the continuance of an emergency or because new conditions

had brought about the need for remedial legislation is wholly immaterial. The basic test, as this Court has said, where the legislative judgment is challenged, is "whether any state of facts either known or which could reasonably be assumed affords support for it." *United States v. Carolene Products Co.*, 304 U. S. 144, 154 (1938).

4. The action of other states in dealing with their mortgage problems is of no relevance here.

The fact that mortgage moratorium legislation no longer exists in 24 out of 25 states that originally enacted such laws, is of no relevance to the problem here presented. The local problems of each state are not the same. The very fact that 23 states never found the need for enacting moratorium laws is in itself indicative of the variance of the problems which confront the respective states. It would be a feeble argument that because those states never enacted any moratorium legislation, there was no need for it elsewhere. We need but refer to the decision of this Court in the *Blaisdell* case upholding the Minnesota Mortgage Moratorium Law to show the fallacy of any such contention.

Likewise it is immaterial that other states saw fit not to continue the moratorium legislation. The varying problems and conditions in each state are a matter which has received judicial recognition. See *Hairston v. Danville & Western Ry.*, 208 U. S. 598, 607 (1908); *Jones v. City of Portland*, 245 U. S. 217, 221 (1917).

It has been estimated that the national mortgage debt amounted to approximately \$35,000,000,000 (35-billions) in 1932. CLARK, *The Internal Debts of the United States* (Twentieth Century Fund, 1933), p. 5. The answers of the 1121 out of 1758 lending institutions to whom the Janes Committee sent questionnaires, showed that these institutions alone owned mortgages in New York State

amounting to over five billion dollars which were dated prior to July 1, 1932. (Janes Committee Report, 1942 Leg. Doc. No. 45, pp. 12, 15.) Considering the holdings of the institutions who failed to answer and those of private parties, it is fair to assume that the entire mortgage indebtedness in New York State in 1932 was about 25% of the nation-wide total. New York's problem was evidently greater both relatively and absolutely than that of other states.

The Home Owners Loan Corporation sustained losses in New York State running into many millions on foreclosures and subsequent resales. Liquidation of advances made in New York on dwellings was considerably slower than elsewhere in the nation (see App. Br. pp. 67-68).

Appellant urges that the necessity for federal rent control and the enactment by New York State of statutes regulating rentals for business property is indicative of the prosperous nature of real estate. One of the prime purposes of both federal rent control and of the New York statutes regulating rentals for business premises was the prevention of inflation. Further, the New York statutes regulating rentals of business property (L. 1945, c. 3, as amended by c. 315 and c. 314), have little relation to the problem at hand. These statutes were enacted to prevent rent gouging and interference with the war effort. It is a fact of common knowledge that the persons most affected by the mortgage moratorium are owners of one and two family homes and not owners of commercial space.

Nor do we find any significance in the fact that some states have declared their mortgage moratorium laws unconstitutional. Of the six states cited in appellant's brief (p. 24)—Iowa, Mississippi, Arizona, Nebraska, Kansas and Texas—the Courts in the last two mentioned states did not declare the moratorium law invalid on the basis

of a finding that the emergency had terminated. Thus in the Kansas case—*Farm Mortgage Holding Co. v. Miller*, 143 Kan. 790, 57 P. (2d) 35 (1936), the Court followed its previous decision in *Kansas City Life Ins. Co. v. Anthony*, 142 Kan. 670, 52 P. (2d) 1268 (1935), where it was held that where a judgment of foreclosure had been entered prior to the enactment of the moratorium statute, the Court had no power to extend the period of redemption. This decision was predicated on the theory that the previously entered judgment could not be annulled by subsequent legislation "even on the theory of the existence of an emergency."

In *Travelers Ins. Co. v. Marshall*, 124 Tex. 45, 76 S. W. (2d) 1007 (1934), the Texas Court held that it was not obliged to follow the *Blaisdell* decision on the ground that that case could not control the state constitutional provision which, in terms similar to Art. 1, § 10 of the Federal Constitution, prohibits the state from impairing the obligation of contracts, and that no moratory legislation even under emergency conditions could be enacted in the state. The correctness of that holding is open to serious question. Cf. *People v. Defore*, 242 N. Y. 13, 20, 150 N. E. 585, 587 (1926), cert. den. 270 U. S. 657 (1925); *People v. Reiss*, 255 App. Div. 509, 510, 8 N. Y. S. (2d) 209, 211 (1st Dept. 1938), aff'd, 280 N. Y. 539, 20 N. E. (2d) 8 (1939).

Moreover all the six states referred to are primarily either agricultural or cattle states, which do not have the same problems as New York. It appears from the decision in *First Trust Company of Lincoln v. Smith*, 134 Neb. 84, 277 N. W. 762 (1938) (App. Br. p. 24), that the court was greatly impressed by the vast amount of governmental financial assistance accorded farm owners by the Federal Land Banks. These banks were empowered to lend farmers 75 per cent of the normal value of their

land at interest rates of $4\frac{1}{2}$ per cent for the first five years and 5 per cent thereafter, with no amortization of principal during the first 5 year period. Mortgage loans to farmers by this agency aggregated more than $21\frac{1}{2}$ billion dollars. Unquestionably, these factual considerations played a large part in the determination of all those cases.

Further, the statute invalidated by the Nebraska Court was substantially different from the statute at bar. There was no requirement under the Nebraska Act that interest, taxes or amortization be paid. While the court was permitted to fix a monthly rental, it appeared in that case that after the application of all moratorium rentals collected, there remained unpaid taxes amounting to \$1600 over a seven year period.

We submit that neither the facts adduced nor the arguments advanced, furnish any justifiable basis for invalidating the New York statute presently challenged. In the words of Chief Justice STONE (then an Associate Justice) in *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U. S. 532, 543 (1935):

"Indulging the presumption of constitutionality which attaches to every state statute, we cannot say that this one, as applied, lacks a rational basis or involved any arbitrary or unreasonable exercise of state power."

Conclusion

We have demonstrated that on the basis of facts which were commonly known, and on the basis of the report of its Joint Legislative Committee, the action of the New York Legislature in enacting the 1943 statute was neither arbitrary nor capricious, but was based upon reasonable grounds; and that the remedy evolved was an appropriate

means of dealing with the declared emergency. Appellant's proof, at best, merely shows that reasonable men might perhaps differ as to the necessity for the 1943 enactment. But "within the field where men of reason may reasonably differ, the legislature must have its way." (CARDOZO, J., in *Williams v. Mayor*, 289 U. S. 36, 42 [1933].)

The judgment appealed from should be affirmed.

September 27, 1945.

Respectfully submitted,

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3
SUPREME COURT OF THE UNITED STATES.

No. 62.—OCTOBER TERM, 1945.

The East New York Savings Bank,

Appellant,

vs.

Alvin Hahn and Hannah Hahn.

Appeal from the Supreme
Court of the State of New
York, County of Kings.

[November 5, 1945.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This was an action begun in 1944 to foreclose a mortgage on real property in the City of New York for non-payment of principal that had become due in 1924. The trial court held that the foreclosure proceeding was barred by the applicable New York Moratorium Law. 182 Misc. (N. Y.) 863. This Law, Chapter 93 of the Laws of New York of 1943, extended for another year legislation first enacted in 1933, whereby the right of foreclosure for default in the payment of principal was suspended for a year as to mortgages executed prior to July 1, 1932.¹ Year by year (except in 1941 when an extension for two years was made), the 1933 statute was renewed for another year. The New York Court of Appeals, one judge dissenting, affirmed the trial court's judgment. 293 N. Y. 622. Upon claim duly made below that the Moratorium Law of 1943 was repugnant to the Contract Clause of the Constitution of the United States, Art. I, §10,⁶ the case is here on appeal under § 237(a) of the Judicial Code, 28 U. S. C. § 334(h). The validity of the statute is likewise challenged under the Fourteenth Amendment but too feebly to merit consideration.

Since *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, there are left hardly any open spaces of controversy concerning the constitutional restrictions of the Contract Clause upon moratory legislation referable to the Depression. The comprehensive opinion of Mr. Chief Justice Hughes in that case cut beneath the

¹ The 1943 Moratorium Law made the payment of interest, taxes, insurance, and amortization charges a prerequisite to suspension of foreclosure. These conditions concededly were met and the only default here was in unpaid principal.

skin of words to the core of meaning. After a full review of the whole course of decisions expounding the Contract Clause—covering almost the life of this Court—the Chief Justice, drawing on the early insight of Mr. Justice Johnson² in *Ogden v. Saunders*, 12 Wheat. 213, 286, as reinforced by later decisions cast in more modern terms, *e.g.*, *Manigault v. Springs*, 199 U. S. 473, 480; *Marcus Brown Co. v. Feldman*, 256 U. S. 170, 198, put the Clause in its proper perspective in our constitutional framework. The *Blaisdell* case and decisions rendered since (*e.g.*, *Honeyman v. Jacobs*, 306 U. S. 539; *Veix v. Sixth Ward Assn.*, 310 U. S. 32; *Gelfert v. National City Bank*, 313 U. S. 221; *Paitoute Co. v. Asbury Park*, 316 U. S. 502), yield this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State “to safeguard the vital interests of its people”, 290 U. S. at 434, is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.

The formal mode of reasoning by means of which this “protective power of the State”, 290 U. S. at 440, is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State’s exercise of its power enforces, and does not impair, a contract. A more candid statement is to recognize, as was said in *Manigault v. Springs*, *supra*, that the power “which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the . . . general welfare of the people, and is paramount to any rights under contracts between individuals.” 199 U. S. at 480. Once we are in this domain of the reserve power of a State we must respect the “wide discretion on the part of the legislature in determining what is and what is not necessary”. *Ibid.* So far as the

² For Mr. Justice Johnson’s constitutional views regarding the scope and limits of the Contract Clause, see Morgan, *Mr. Justice William Johnson and the Constitution* (1944) 57 Harv. L. Rev. 328, 352 *et seq.*, and Hale, *The Supreme Court and the Contract Clause: III* (1944) 57 Harv. L. Rev. 852, 872, *et seq.* See also Levin, *Mr. Justice William Johnson and the Unenviable Dilemma* (1944) 42 Mich. L. Rev. 803; *Mr. Justice William Johnson, Creative Dissenter* (1944) 43 Mich. L. Rev. 497; *Mr. Justice William Johnson and the Common Incidents of Life* (1945) 44 Mich. L. Rev. 59.

constitutional issue is concerned, "the power of the State when otherwise justified", *Marcus Brown Co. v. Feldman*, 256 U. S. 50, 198, is not diminished because a private contract may be affected.

Applying these considerations to the immediate situation brings us to a quick conclusion. In 1933, New York began a series of moratory enactments to counteract the virulent effects of the depression upon New York realty which have been spread too often upon the records of this Court to require even a summary. Chapter 793 of the Laws of 1933 gave a year's grace against foreclosures of mortgages, but it obligated the mortgagor to pay taxes, insurance, and interest. The validity of the statute was sustained in *Klinke v. Samuels*, 264 N. Y. 144. The moratorium has been extended from year to year. When the 1937 reenactment was questioned, the New York Court of Appeals again upheld the legislation. *McGuire & Co. v. Lent & Lent, Inc.*, 277 N. Y. 694. This decision was rendered after a joint legislative committee had made a thorough study and recommended continuance of the moratorium. New York Legislative Document (1938) No. 58. In 1941, the Legislature reflected some changes in economic conditions by requiring amortization of the principal at the rate of 1% per annum, beginning with July 1, 1942. The same legislature established another joint legislative committee to review once more the New York mortgage situation. "After a most exhaustive study of the moratorium", a report was submitted recommending its extension for another year. New York Legislative Document (1942) No. 45. The Governor of New York urged such legislation (New York Legislative Document (1943) No. 1, p. 9) and the Law now under attack was enacted. It is relevant to note that the New York Legislature in subsequent extensions of the moratorium again took note of changed economic conditions by increasing the amortization rate to 2% in 1944 (L. 1944, C. 562) and to 3% in 1945 (L. 1945, C. 378).

Appellant asks us to reject the judgment of the joint legislative committee, of the Governor, and of the Legislature, that the public welfare, in the circumstances of New York conditions, requires the suspension of mortgage foreclosures for another year. On the basis of expert opinion, documentary evidence, and economic arguments of which we are to take judicial notice, it urges such a change in economic and financial affairs in New York as to deprive of all justification the determination of New York's legisla-

ture of what New York's welfare requires. We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions insofar as they affect the mortgage market—bank deposits and war savings bonds; increased pay-rolls and store sales; available mortgage money and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements, namely the effect of the war and of its termination, and similar matters. Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary. Unlike *Worthen Co. v. Kavanaugh*, 295 U. S. 56, 60, here there was no “studied indifference to the interests of the mortgagee or to his appropriate protection”. Here the Legislature was not even acting merely upon the pooled general knowledge of its members. The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts. The New York Legislature was advised by those having special responsibility to inform it that “the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate.” New York Legislative Document (1942) No. 45, p. 25. It would indeed be strange if there were anything in the Constitution of the United States which denied the State the power to safeguard its people against such dangers. There is nothing. Justification for the 1943 enactment is not negatived because the factors that induced and constitutionally supported its enactment were different from those which induced and supported the moratorium statute of 1933.

It only remains to say that in *Chastleton Corp. v. Sinclair*, 264 U. S. 543, which was strongly pressed on us, the Court dealt with quite a different situation. The differentiating factors are too glaring to require exposition.

Judgment affirmed.

Mr. Justice RUTLEDGE concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of this case.